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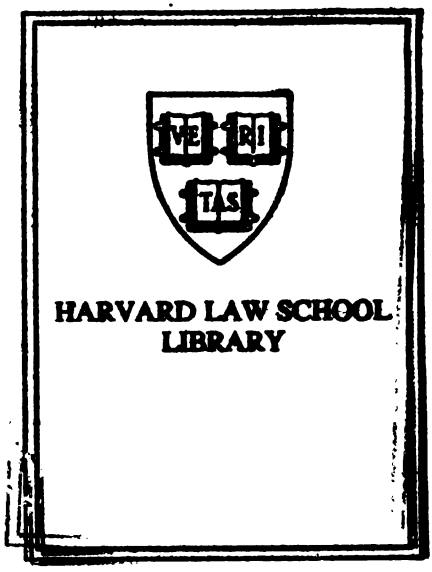

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MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

APRIL 11TH, TO MAY 16TH, 1890.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 80.

CHICAGO:
CALLAGHAN & CO.,
1890.

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Rec. Feb. 9, 1891

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REPORTER'S NOTE.

Mr. Justice CAMPBELL was present at the argument, but, by reason of his death, took no part in the decision, of the following cases published in this volume:

Alpena Nat'l Bank v. Greenbaum, Ford v. Ford, Brown v. Gilchrist, Wisconsin Fire & Marine Ins. Co. v. Filer, Taylor v. Bay City Street Ry. Co., Page v. Kress, Black v. Ashley, Chapel v. Smith, Chippewa Lumber Co. v. Ins. Co., Peters v. Cartier, Near v. Donnelly, Conlin v. Masecar, Edsell v. Nevins, Saenger v. Von der Heide, Laughlin v. Street Ry. Co., Porter v. Chicago & West Mich. Ry. Co., Leonard v. Beaudry, Stewart v. C., W. & M. Ry. Co., Brezee v. Powers, Grady v. Hughes, People v. Therrien, Smith v. Auditor General, Burton v. Tuite.

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STATE JUDICIAL DIRECTORY

For 1890.

SUPREME COURT.

JOHN W. CHAMPLIN (CHIEF JUSTICE), . . GRAND RAPIDS.
[TERM EXPIRES DECEMBER 31, 1891.]

ASSOCIATE JUSTICES:

		TERM EXPIRES.
ALLEN B. MORSE, . . .	IONIA, ...	Dec. 31, 1893.
EDWARD CAHILL, . . .	LANSING, ...	———
CHARLES D. LONG, . . .	DETROIT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.

COURT OFFICERS:

CHARLES C. HOPKINS, .	CLERK, ...	LANSING.
MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
BENJAMIN W. HUSTON,	ATTORNEY GENERAL, . .	VASSAR.

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CIRCUIT JUDGES.

1.	VICTOR H. LANE,	ADRIAN.
2.	THOMAS O'HARA,	BERRIEN SPRINGS.
3.	GEORGE GARTNER, HENRY N. BREVOORT, CORNELIUS J. REILLY, GEORGE S. HOSMER,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	FRANK A. HOOKER,	CHARLOTTE.
6.	JOSEPH B. MOORE,	LAPEER.
7.	WILLIAM NEWTON,	FLINT.
8.	VERNON H. SMITH,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	CHAUNCEY H. GAGE,	SAGINAW.
	JOHN A. EDGET,	EAST SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	WILLIAM D. WILLIAMS,	MARQUETTE.
13.	J. G. RAMSDELL,	TRAVERSE CITY.
14.	ALBERT DICKERMAN,	MUSKEGON.
15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, MARSDEN C. BURCH,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	DAN. J. ARNOLD,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
25.	JOHN W. STONE,	HOUGHTON.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT. . . . . F. H. CHAMBERS.

(Jan. 7, Mar. 4, May 6, July 1, Sep. 2, Nov. 4, 1891.)

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

(Mar. 9, May 11, 1891.)

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TERMS OF COURT FOR 1891.

COUNTIES.	CIR-CUITS.	SESSIONS OF COURT.			
Alcona	23	February 10.	June 23.	November 17.	
Alger	11	June 2.	Nov. 10.		
Allegan	20	February 9.	May 18.	October 5.	December 7.
Alpena	26	February 10.	May 5.	August 11.	November 3.
Antrim	13	March 10.	May 19.	July 28.	November 10.
Arenac	18	February 23.	Aug. 24.		
Baraga	12	January 5.	June 8.	October 5.	
Barry	5	February 9.	May 11.	August 17.	November 9.
Bay	18	March 3.	June 2.	September 1.	December 1.
Benzie	23	April 14.	Sept. 1.	December 1.	
Berrien	2	January 13.	March 17.	May 19.	October 20.
Branch	15	March 2.	June 1.	October 5.	December 7.
Calhoun	5	March 9.	June 1.	September 14.	December 7.
Cass	2	February 17.	April 28.	September 22.	December 1.
Charlevoix	13	February 17.	May 12.	July 21.	November 17.
Cheboygan	13	January 27.	March 24.	June 16.	September 22.
Chippewa	11	February 3.	May 12.	September 15.	
Clare	21	January 5.	March 30.	June 22.	September 21.
Clinton	29	February 2.	April 27.	June 29.	November 9.
Crawford	23	January 13.	April 21.	October 6.	
Delta	25	January 6.	May 5.	September 29.	
Eaton	5	January 19.	April 20.	July 20.	October 19.
Emmet	13	February 10.	May 5.	July 14.	October 27.
Genesee	7	February 23.	May 25.	August 17.	November 16.
Gladwin	18	January 19.	May 25.	October 12.	
Gogebic	12	January 29.	May 11.	August 3.	November 2.
G'd Traverse	13	January 6.	April 7.	June 23.	October 13.
Gratiot	29	March 9.	June 1.	September 14.	December 7.
Hillsdale	1	January 13.	March 17.	September 1.	November 10.
Houghton	12	February 9.	May 25.	August 17.	November 16.
Huron	24	January 5.	March 2.	June 1.	October 26.
Ingham	4	January 5.	March 9.	May 25.	October 19.
Ionia	8	February 2.	May 4.	September 21.	November 2.
Iosco	23	March 3.	June 2.	September 1.	December 1.
Iron	25	January 14.	May 13.	October 7.	
Isabella	21	February 23.	May 18.	September 7.	October 19.

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TERMS OF COURT FOR 1891.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Jackson	4	February 2.	April 20.	September 14.	November 16.
Kalamazoo	9	February 16	May 18.	October 12.	December 14.
Kalkaska	28	January 13.	April 21.	September 8.	----------
Kent	17	March 2.	May 3.	September 28	December 7.
Keweenaw	12	January 12.	June 15.	October 12.	----------
Lake	19	February 16.	June 15.	October 12.	----------
Lapeer	6	January 12.	March 9.	July 13.	November 2.
Leelanaw	13	March 17.	June 9.	November 24.	----------
Lenawee	1	February 10.	April 28.	October 6.	December 8.
Livingston	7	January 12.	April 20.	June 15.	October 12.
Luce	11	May 5.	Nov. 3.	----------	----------
Mackinac	11	February 24.	June 9.	October 13.	----------
Macomb	16	January 19.	April 20.	August 17.	October 19.
Manistee	19	January 19.	May 4.	August10.	October 26.
Manitou	11	June 23.	Oct. 27.	----------	----------
Marquette	25	February 9.	May 20.	September 8.	December 1.
Mason	19	February 2.	May 18.	August 24.	November 9.
Mecosta	27	January 6.	April 7.	July 2.	November 3.
Menominee	25	January 20.	April 21.	August 25.	November 10.
Midland	21	January 19.	April 13.	August 31.	September 28.
Missaukee	28	March 3.	July 21.	December 8.	----------
Monroe	22	February 3.	April 7.	September 8.	November 3.
Montcalm	8	March 2.	June 1.	October 5.	December 7.
Montmorency	26	May 19.	Sept. 15.	----------	----------
Muskegon	14	February 9.	May 11.	September 14.	November 23.
Newaygo	27	March 3.	June 2.	October 6.	December 1.
Oakland	6	February 2.	May 4.	September 21.	December 7.
Oceana	14	January 12.	April 20.	August 17.	October 26.
Ogemaw	23	January 27.	May 12.	October 20.	----------
Ontonagon	12	January 19.	June 22.	October 19.	----------
Osceola	19	March 2.	June 1.	September 14.	December 7.
Oscoda	23	February 23.	May 25.	November 2.	----------
Otsego	26	January 20.	June 16.	October 6.	----------
Ottawa	20	January 12.	March 9.	August 3.	November 2.
Presque Isle	26	January 13.	June 9.	October 13.	----------
Roscommon	28	February 3.	May 26.	October 13.	----------
Saginaw	10	February 2.	April 13.	June 8.	Oct. 5. | Dec. 7.
Sanilac	24	January 19.	April 13	June 2.	September 28.
Schoolcraft	11	January 20.	April 28	September 8.	----------
Shiawassee	7	February 2.	May 4.	September 14.	December 14.
St. Clair	16	February 16	May 18.	September 21.	November 16.
St. Joseph	15	January 20.	March 24.	July 14.	October 27.
Tuscola	24	February 2.	May 4.	September 7.	December 7.
Van Buren	9	January 12.	April 13.	September 14.	November 9.
Washtenaw	22	March 2.	May 4.	October 5.	December 7.
Wayne	3	January 6.	April 7.	June 16.	September 8.
Wexford	28	January 20.	April 28.	July 28.	November 3.

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APRIL TERM, 1890.*

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THE ALPENA NATIONAL BANK v. HARRIS GREENBAUM AND NATHAN EPSTEYN, IMPLEADED, ETC.†

[See 74 Mich. 157]

Principal and surety—Bills and notes—Pleading—Fraud—False representations—Trustees—Banks and banking—Evidence.‡

1. A lumbering corporation mortgaged all of its property to secure certain creditors, among whom was a bank of which the mortgagee was president, which had discounted the mortgagor's notes. Among such notes were two given in renewal of paper made in payment for goods, and which the payees had indorsed in such a manner as to become sureties for the maker, and upon which they had received full payment. The mortgagee disposed of the property, and paid all of the claims in full except said discounted paper, and held the balance for *pro rata* distribution. Before such partial payment was indorsed, the bank sued the corporation and indorsers upon the two notes, in which suit the indorsers gave notice that they would show that the credit for the goods sold the corporation was secured through the representations of the president of the bank as to the solvency of the corporation, and that if they would sell the goods the bank would discount the corporation's notes given therefor, and that the vendors should not be liable on their indorsements of such notes; that at this time the corporation was indebted to the bank, and it was agreed between

*Continued from Vol. 79.

† A satisfactory report of this case has been a task which I can hardly hope to have accomplished, but the leading facts and points have been summarized, which I trust will aid in its examination. —REPORTER.

‡For full digest of points decided, see *Table of Cases Reported.*

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it and the president of the bank that such representations should be made, when in fact the corporation was insolvent, to the knowledge of said president. The suit was tried, and the bank recovered a judgment for the full amount of the notes, which the Supreme Court reversed, on the ground that the evidence showed that the mortgagee had collected sufficient money to pay *all* of the secured claims, of which sum enough was held by him in deposit in the bank to pay the notes in suit, and that it was the duty of the bank to make such application. See *Bank v. Greenbaum*, 74 Mich. 157.

On a second trial the defendants added to their former notice a copy of the opinion of the Supreme Court, and also gave notice that they would show that at the time of their indorsement of the *notes in suit* there was a fraudulent agreement between the bank and the corporation that the latter would turn over all of its property to the bank when asked so to do, or give security thereon, for its indebtedness to the bank, which agreement was concealed from the defendants, as also the fact of such indebtedness, a knowledge of either of which facts would have prevented them from taking or indorsing the notes in suit. The president of the bank (mortgagee) testified on such trial positively that the property did not realize enough to pay all of the secured debts, and that after paying all of said debts which had *priority* over said discounted paper he deposited the balance in the bank, and took certificates of deposit in his own name, but deferred applying the *pro rata* share applicable to the notes in suit until the validity of defendants' indorsements was determined. The defendants recovered a general verdict, and on a second review of the case it is held that, if the mortgagee's testimony was true, he was justified in not making such *pro rata* distribution. And it is further held that if the defendants are not entitled to be discharged absolutely from all liability by reason of the fraud and deceit set up in their notices, which right it is held they have not maintained by *legal* and *proper* testimony, the proper method for them to pursue, if they believe the trustee has not faithfully executed his trust, is to file a bill in chancery for an accounting, in which suit the whole matter of such execution can be gone into, and the trustee charged with all proper items. The bank can be made a co-defendant, and, upon a proper showing, the further prosecution of this suit can be enjoined until such accounting is completed.

2. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—There is no practice authorizing a defendant to interpose

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a special notice of defense, setting forth the opinion of the Supreme Court on reversing a judgment recovered by the plaintiff on a former trial.

b—Where, in a suit upon two promissory notes against indorsers, a judgment in favor of the plaintiff is reversed on the ground that the record shows that the notes have been paid, a judgment in favor of the defendants on a second trial will stand affirmed, unless the record discloses a different state of facts upon the question of such payment.

c—It is not sufficient to show the making of representations alleged to be false, but their falsity must be proved in order to charge the maker with actionable fraud.

d—The practice is settled in this State, as at common law, that it is not competent to prove distinct facts in defense that have not been made part of the issue as framed. *Bourreseau v. Evening Journal Co.*, 63 Mich. 487.

So *held*, where evidence of a different fraud than that set up in defendant's notice was admitted by the trial court.

e—The payees in certain notes sold them to a bank, and became sureties for the maker by the manner of their indorsement. At the request of the maker, and by the consent of the sureties, the notes were renewed, on which renewal notes suit was brought, and the sureties (indorsers) claimed that they were induced to consent to the extension by the fraudulent representations of the holder of the notes as to the solvency of the maker, and that their *second* indorsement was void; and it is held that, if the renewal notes were invalid, the original notes remained in full force, upon which the indorsers were liable, and that their defense, if sustained, only went to a recoupment, under proper pleadings, to the extent of the injury actually suffered by reason of extending the time for payment.

f—Where, in a suit against indorsers their defense is non-liability because of fraud practiced in securing their indorsement, testimony which recognizes such liability, and seeks to establish a discharge by matters *ex post facto*, is inadmissible.

g—Good faith and fair dealing is all that is required of a creditor in his transactions with a debtor who occupies the position of a surety to a contract, and these do not require the creditor to inform such surety of *other* and independent transactions with the principal debtor.

h—To hold that, when an indorser of a note applies to have it discounted for his own accommodation, the silence of the bank as to other indebtedness of the maker to the bank, and of his assurance that he will give security if required, is a fraud upon the indorser, enabling him to retain the considera-

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tion received for the note, and discharge him from liability as indorser, is a doctrine too palpably absurd for serious consideration.

i—To hold a bank as trustee, *simply* because its president and financial manager is a trustee for the benefit of creditors, would operate harshly and unjustly upon the rights of a majority of its stockholders, and make them responsible for acts which neither they nor the board of directors of the bank ever authorized or assented to, and would unjustly condemn them to losses concerning which they have never had a hearing in a court of justice.

Error to Ingham. (Peck, J.) Argued January 15, 1890. Decided April 11, 1890.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Cahill & Ostrander (*R. J. Kelley,* of counsel), for appellant, contended:

1. Neither the president nor cashier of a bank has the right, without express authority, from the board of directors, to release an indorser or surety on a note without payment; citing *Bank v. Dunn,* 6 Pet. 51; *Bank v. Jones,* 8 Id. 12; *Horrigan v. Bank,* 9 Baxter, 142; *Mapes v. Bank,* 80 Penn. St. 163; *Bank v. Bennett,* 33 Mich. 520; *Wheat v. Bank,* 5 S. W. Rep. 305; *Thompson v. McKee,* 5 Dak. 172; Morse, Bank. (2d ed.) 146–149, 188.
2. The fact that, as between themselves and the Prentiss Lumber Company, the latter should have paid the notes, did not prevent the bank's regarding the indorsers as principals; citing *Wetherwax v. Paine,* 2 Mich. 555; *Rothschild v. Grix,* 31 Id. 150; *Herbage v. McEntee,* 40 Id. 337; *Sibley v. Bank,* 41 Id. 196; *Robbins v. Brooks,* 42 Id. 62.

Turnbull & Dafoe (*R. A. Montgomery,* of counsel), for defendants.

J. C. Shields, of counsel for defendants, contended:

1. In support of the claim that the former decision is conclusive upon the present record, counsel cited Wells, *Res. Adj.* §§ 145, 146; *Railroad Co. v. Ketchum,* 34 How. Pr. 302; *Stacy v. Railroad Co.,* 32 Vt. 551; *Stewart v. Sprague,* 76 Mich. 184; *Barnum v. Stone,* 27 Id. 332; *Bewick v. Fletcher,* 41 Id. 625; *Mynning v. Railroad Co.,* 67 Id. 677.

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2. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, with full knowledge of their existence, which is withheld, releases the surety; citing De Coly. Guar. 376; *Dawson v. Lawes*, 23 Law J. Ch. 434; *Mactaggart v. Watson*, 3 Clark & F. 525; *Shepherd v. Beecher*, 2 P. Wms. 288.

3. The creditor is bound to observe the utmost good faith towards the surety in all subsequent transactions with the principal debtor; citing Story, Eq. Jur. § 324; *Leicester v. Rose*, 4 East, 372.

4. All the authorities hold that, when the original contract is changed in the least, it discharges the surety; citing 2 Pom. Eq. Jur. § 907, and cases cited; Cooley, Torts, 483; *Machine Co. v. Farrington*, 82 N. Y. 125; *State v. Sooy*, 39 N. J. Law, 142; *Sewing Machine Co. v. Kezertee*, 49 Wis. 414; *Booth v. Storrs*, 75 Ill. 438; *Han v. Greve*, 34 Ind. 18; *Doughty v. Savage*, 28 Conn. 146; *Graves v. Bank*, 10 Bush, 80; *Bank v. Railway Co.*, 65 Iowa, 692.

CHAMPLIN, C. J. This case was before this Court at the January term, 1889, and is reported in 74 Mich. 157. The Prentiss Lumber Company was a corporation organized under the laws of the State of Michigan, and was doing business at the city of Alpena, where it owned a saw-mill, and was engaged in the manufacture and sale of lumber. On September 7, 1883, it was largely in debt; and on account of losses and financial embarrassments, it was not able to meet its commercial paper at maturity, and, in order to secure the payment of certain classes of its paper and debts, it executed to George L. Maltz, of Alpena, two mortgages,—one upon its saw-mill property and appurtenances, upon condition and in trust to pay the following indebtedness, with interest at 7 per cent. until paid, namely:

George L. Maltz	$13,000 00
The Alpena National Bank	77,500 00
Hubbell, Brown & Co., of Cleveland, Ohio	2,000 00
Pierce & Coleman, of Dayton, Ohio	7,500 00
Mary C. Prentiss, of Alpena	2,700 00
Rectina P. Chase, of Syracuse, N. Y.	186 00

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A. R. &. W. F. Linn, of Detroit	$8,085 75
The Labor account	10,000 00
Total	$115,921 75

The other mortgage was upon certain personal property, and was also in trust to pay the following indebtedness of the Prentiss Lumber Company, with interest at 7 per cent. until paid, namely:

George L. Maltz, of Alpena	$13,000 00
The Labor Account, being the aggregate amount then due certain laborers and employés then in the employ of the company, for labor performed about the mill and mill premises, and the rafting and handling of logs of the company	10,000 00
The Alpena National Bank, a sum sufficient to cover the direct loans of the bank made to the Prentiss Lumber Company, and the amount of all paper held by the bank accepted or indorsed by A. R. & W. F. Linn or George Prentiss, and estimated at about	21,535 75
Perry Prentiss, of Cleveland, Ohio	1,500 00
Hubbell, Brown & Co., of Cleveland, Ohio	2,000 00
Pierce & Coleman, of Dayton, Ohio	7,500 00
Mary C. Prentiss, of Alpena	2,700 00
Rectina P. Chase, of Syracuse, N. Y.	186 00
The remainder of the indebtedness to the Alpena National Bank, arising from paper of first party held by said bank, about the sum of	59,000 00
Total	$117,421 75

It was expressly agreed in the chattel mortgage that the indebtedness stated above should be paid in the order above set forth, so far as the avails of the chattel mortgage security would pay the same. The mortgagee was authorized to sell at public or private sale, and apply the proceeds thereof in liquidation of said debts, interest, and reasonable expenses.

Both mortgages bore date September 7, 1883, and were executed at the same time, as parts of one transaction, and, according to familiar rules, must be construed

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together, as one instrument. Maltz immediately took possession of the personal property, and proceeded to convert it into money. A quantity of logs he hired sawed at the mill, and sold the lumber. He has converted all of the property covered by both mortgages into money, and has received as the avails thereof the following sums:

From the sale of logs	$36,638 55
From the sale of lumber	37,998 02
From the sale of other personal property	2,683 76
From the sale of saw-mill	35,000 00
Total	$112,320 33

It appears that previous to the failure of the Prentiss Lumber Company the defendants, Greenbaum and Epsteyn, being then in partnership, and prior to January 1, 1883, sold to the Prentiss Lumber Company goods for which they took the notes of the company. Such notes were by them indorsed and discounted at the Exchange Bank of George L. Maltz. After February 1, 1883, one of such notes was sold and transferred by Maltz to the Alpena National Bank, and another, given April 23, 1883, was by Greenbaum and Epsteyn indorsed and discounted at the Alpena National Bank; and were held by the bank at the time the mortgages were executed to Maltz, and formed a portion of the class secured by the last clause of the chattel mortgage. The Alpena National Bank brought this suit against the maker and indorsers of these notes, two in number, which had been given in renewal of such former notes. The indorsers appeared to the action, and set up several defenses in their notice filed under the plea of the general issue, viz.:

1. That Greenbaum and Epsteyn sold goods for which the notes were given to the Prentiss Lumber Company upon credit, by and through the representations of Maltz as to the solvency and standing of the Prentiss Lumber Company, and to the effect that, if they would sell to the Prentiss Lumber Company on credit, and receive its

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notes, the Alpena National Bank would receive such notes, and discount the same, and look absolutely to said Prentiss Lumber Company for their payment, and that Greenbaum and Epsteyn were not to be liable upon their indorsements at all.

2. That Greenbaum & Epsteyn were induced to sell goods to the Prentiss Lumber Company by the false and fraudulent representations of Maltz, as president and general manager of the Alpena National Bank, that the Prentiss Lumber Company was entirely solvent, and had goods, money, and other property, to the amount of over $100,000, over and above all debts and liabilities, and the defendants would be safe and secure in making such sales upon credit; that at this time the Prentiss Lumber Company was indebted to the Alpena National Bank in the sum of several thousand dollars, and there was an understanding and agreement between George Prentiss, representing the Prentiss Lumber Company, and George L. Maltz, as president and general manager of the Alpena National Bank, that the said Maltz, as president and general manager, should represent the Prentiss Lumber Company to be entirely solvent, and in good credit, when, as a matter of fact, it was absolutely insolvent, and known to be so by the said George L. Maltz, for the purpose of getting credit, and inducing Greenbaum & Epsteyn to sell on credit said goods, and take therefor the notes of the Prentiss Lumber Company.

After the reversal of the case in this Court, as before stated, the defendants interposed another notice, which is entirely unauthorized in practice, setting forth in such notice the entire opinion of this Court in disposing of the case, and also the memorandum filed in refusing a rehearing.

They also appended thereto a notice of a third defense, as follows:

"And also that at the time the notes in suit were indorsed there was a fraudulent understanding and agreement between the Prentiss Lumber Company, represented by George Prentiss, and the plaintiff that, whenever the plaintiff should ask for it, or demand the same, the Prentiss Lumber Company would turn over to the plaintiff, absolutely, all its property, or give security thereon, to

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pay or secure a large indebtedness due from the Prentiss Lumber Lumber Company to the plaintiff, which agreement and understanding was fraudulently concealed from all of said defendants by the plaintiff, as well as the existence of any indebtedness from the Prentiss Lumber Company to the plaintiff, when, if either of said facts were made known to any of said defendants, said defendants would not have taken or indorsed the notes of the Prentiss Lumber Company in suit."

When the case was here before, it satisfactorily appeared to us, from the record then before us, that Mr. Maltz had collected from the assets sufficient money to pay all of the claims secured by the mortgages in full; and it was upon this fact that we held the notes in suit paid. We said:

"It appears that Mr. Maltz collected and holds in deposit, in the bank or in his hands, money enough to pay this paper, and which is, by the terms of the trust, applicable to such payment."

And we refused to examine the other errors alleged—

"Because, in our opinion, the evidence showed payment of the paper."

The first question to be disposed of, therefore, is whether the record now before us discloses a different state of facts upon that point. If it does not, the judgment in favor of the defendants must stand affirmed, as the opinion then announced, so far as the facts are the same, is the law of the case.

The testimony presented in this record is not the same upon *this point* as it was when the case was tried before. The defendants' counsel did not see fit to rest their defense before the jury upon the question of payment, nor, indeed, were they content to try the case upon the same issues involved in the suit as first tried, but they interposed a notice of a new and different defense, and introduced a mass of testimony which they claimed tended

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to prove the defenses set up in their notice; and these defenses were submitted by the court to the jury as if they were of the first importance, and the question of payment was laid before the jury in a manner which made it appear to be of only secondary importance. The jury found a general verdict for the defendants. So we are unable to determine whether the jury found that the notes had been fully paid because of enough money having been collected to pay the indebtedness secured by the mortgage in full, or whether they found that there was no cause of action on account of the other defenses set up.

On the trial in this case, Mr. Maltz testified positively and unequivocally, that—

"The property did not realize enough to pay all the indebtedness covered by the mortgage."

He also testified that after converting all the property into money, and paying all the indebtedness mentioned in the mortgage prior to that secured by the last clause, the balance on hand to apply upon this indebtedness was the sum of $13,842.65; that the last money realized was the sale of the saw-mill on February 15, 1886; and that, since the last trial, he had apportioned the balance on hand *pro rata* among the creditors in that class as of that date, and had indorsed the share applicable to the notes in suit upon such notes. If this testimony be true and there is no positive testimony in contradiction of it, then the notes in suit were not fully paid, as held in our former opinion. Whether the jury found it true or not, we cannot tell, because the other defenses were submitted to them, and the judge instructed them if they found such defenses established by a preponderance of testimony, they should find for the defendants.

I shall not analyze the testimony *pro* and *con* to show, or draw inferences, that enough money had in fact been

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received to pay in full all claims secured by these mortgages out of the $112,320.33 acknowledged to have been received by Mr. Maltz. I will only say that possibly the figures and the testimony may be so handled as to make it appear that enough was received; and the skillful counsel for the defendants in his brief so places them as to make it thus appear. But he has made no allowances for interest, or expenses of the trust. The indebtedness all drew interest, some of which had accrued at the time the mortgages were executed. The property was sold from time to time during the years 1883, 1884, 1885, and 1886; the last sale being the saw-mill, for $35,000, on February 15, 1886. The mortgages were dated September 7, 1883. From this date to the last sale was two years, five months, and eight days. It would be within bounds to say that at least an average of one year's interest accrued upon the total indebtedness. We gather from the testimony that the face indebtedness, without interest, embraced in the last clause of the mortgage, was at its date $50,846.84, to which add one year's interest at 7 per cent.,—$3,559.28,—makes a total of $54,406.12. The prior indebtedness secured by the mortgage, as we gather from the testimony, was $58,441.75; to which add one year's interest,—$4,090.92; total, $62,532.67,—making the total indebtedness to be paid, including one year's interest, $116,938.79, which exceeds the sum realized for the property, to say nothing of the expenses of executing the trust, which must have been considerable. Whatever deficit there may be must fall upon the last class secured by the mortgages.

I do not pretend to accuracy in the above figures. This can only be arrived at by an accounting, if there is any dispute, between Mr. Maltz and the creditors. If, however, as appears to be the case with these defendants, such creditors deny all liability on their contract of

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indorsement by reason of the defenses set up in this case, a suit at law will be necessary to settle that question; and this brings us to a consideration of this branch of the case as presented by this record.

In order to understand the points raised by the assignments of error, it is necessary to bear in mind the dates of certain events which have an important bearing upon the rulings of the court in the admission of testimony, as well as upon the defenses set up under the notices given under the plea of general issue.

In 1872, George Prentiss engaged in the business of the manufacture of lumber in Alpena, and took up his residence there in 1878. He continued this business until January or February, 1882, when the Prentiss Lumber Company was organized as a corporation, and this corporation continued the business of manufacturing lumber at Alpena from the date of its organization until on and after September 7, 1883.

In 1880, Greenbaum and Epsteyn, the defendants in this suit, entered into copartnership, and engaged in the business of selling clothing, at Alpena. They continued in such business until April 23, 1883, when they dissolved partnership. They had dealings with George Prentiss down to the time the corporation called "The Prentiss Lumber Company" was organized, and afterwards with such corporation; the total amount of sales being over $7,200. In such dealing they took the individual notes of George Prentiss while he was in business, as follows:

April 14, 1881	$1,081 89
November 4, 1881	801 69
Total	$1,883 58

They took the notes of the Prentiss Lumber Company as follows:

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February 15, 1882	$ 700 00
April 8, 1882	867 85
August 24, 1882	500 00
December 18, 1882	1,014 43
February 15, 1883	1,000 00
April 23, 1883	1,162 76
Total	$5,245 04

All of the foregoing notes were paid except that of December 18, 1882, for $1,014.43, and that of April 23, 1883, for $1,162.76, both of which were afterwards renewed, and are the notes involved in this suit.

From 1872 to February 1, 1883, George L. Maltz was engaged in business at Alpena as a private banker, and conducted it under the name of the "Exchange Bank." On February 1, 1883, the Alpena National Bank was organized under the act of Congress. Maltz owned less than one-half of the stock in this corporation, and was elected a director and president of the bank, and was its financial manager. The note of date December 18, 1882, was discounted by Maltz at his private bank on January 3, 1883, and was sold by him to the Alpena National Bank soon after it organized, and was renewed by a new note of date June 21, 1883, drawn by the Prentiss Lumber Company, payable to the order of John C. Comfort, cashier, and indorsed by Greenbaum and Epsteyn. The note of date April 23, 1883, was discounted by the Alpena National Bank on that day, and was renewed by the parties on August 25, 1883. The original notes were discounted for Greenbaum and Epsteyn, and they received the avails thereof. They were not accommodation indorsers or makers, but they received the full consideration expressed in the notes, less the discount. All sales of goods for which the first-mentioned note was given were made before the Alpena National Bank was organized.

This action is upon contract, brought on the promise of defendants, Greenbaum and Epsteyn, to pay these

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notes. The defendants have, by way of notice, set up three defenses, two of them founded upon what they allege as a fraud perpetrated upon them by George L. Maltz, as president and financial manager of the Alpena National Bank. While retaining the consideration for which their promises were made, they ask to be relieved from all liability, under their first defense, because Maltz, while yet a private banker, and before the plaintiff had an existence, made representations to them, as the president of the plaintiff bank, as to the credit and responsibility of the parties to whom they sold goods for which they took the notes discounted by them, and that Maltz, at the time of such sales, asserted that if they would sell to the Prentiss Lumber Company goods, and receive therefor the notes of the Prentiss Lumber Company, the Alpena National Bank would receive said notes, and discount the same, and look absolutely to the said company for their payment. And, in reliance upon such representations, they sold the goods, took the notes, indorsed them to facilitate collection, but with the understanding that such indorsement was without recourse, and without liability. There is no testimony in this record tending, in the remotest degree, to show that, at the time the sales were made by Greenbaum and Epsteyn for which the note of December 18 was given, such a corporation as the Alpena National Bank was ever thought or spoken of.

With these undisputed facts before us of the business in which the several parties were engaged, and with the dates of the several transactions in our mind, it is clear that the first defense set up cannot by any possibility be true. It is impossible that Mr. Maltz should, as the president and financial manager of the Alpena National Bank, have made the representations set up in the first defense. The allegation is that they were made to

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induce Greenbaum & Epsteyn to sell goods to the Prentiss Lumber Company, and these sales were all made during the years 1881–82–83, and prior to the dissolution of the firm of Greenbaum & Epsteyn. Mr. Greenbaum testified that the goods for which the note of December 18, 1882, was given, were all sold prior to November 28 of that year; and the note of April 23, 1883, was given for sales made between November 28, 1882, and April 20, 1883. It is not claimed that, between the dates last given, any representations were made which induced defendants to sell goods upon crdit to the Prentiss Lumber Company.

Mr. Greenbaum was permitted, against objection, to testify to representations which Mr. Maltz had made to him of the credit and responsibility of the Prentiss Lumber Company in 1881 and 1882; and, also, that when he closed up business with the company, in April, 1883, Prentiss offered him a note to wind up the business, and that he did not care to take the note, and Prentiss told him to find out whether Maltz would discount it, and how the Prentiss Lumber Company stood, and that Maltz told him that he (Greenbaum) could take the note; there was no risk about it; the Prentiss Lumber Company was good, and worth over $100,000; that Maltz said he would discount it in the bank, and he (Greenbaum) would have to run no risk; that the note was all right; "that the Prentiss Lumber Company note is all right;" that he relied upon Maltz's statements, and took the note, and a few days after discounted it at the bank. The admission of this testimony was not only a palpable, but it was pernicious, error. The testimony as to the representations made at the time the note was taken, in April, 1883, was not admissible under the notice; and that with reference to representations made before the organization of the

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bank, and before Maltz could possibly be its president and financial manager, was clearly inadmissible.

In the moral law, we read of visiting the sins of the fathers upon the children unto the third and fourth generations, under certain circumstances. But it is difficult to see how, if private-banker Maltz made any such representations as claimed respecting the credit of the Prentiss Lumber Company, and that the Alpena National Bank would, if such credit was extended, take the notes without recourse against defendants as indorsers, these could be laid at the door of the Alpena National Bank, organized long afterwards. This notice is not only inconsistent with the facts, but it is unsupported by the testimony to sustain that branch of the notice which asserts that, if such sales should be made upon credit, the Alpena National Bank would discount the notes, and look only to the Prentiss Lumber Company for its pay.

It is not necessary for us to decide whether an indorser of commercial paper can be permitted to show by parol that at the time his indorsement was made, and the paper transferred, there was an agreement that he should not be held liable upon his indorsement.

In the second defense, which is set forth above, there exists the same inherent difficulty. The gist of the defense is the fraud of Maltz, as president and financial manager of the Alpena National Bank, in entering into an agreement with George Prentiss, representing the Prentiss Lumber Company, that he (Maltz) should represent the company as entirely solvent, and in good credit, for the purpose of inducing Greenbaum & Epsteyn to sell clothing and gents' furnishing goods, and take therefor the notes of the company, Maltz knowing them to be absolutely insolvent; and, in pursuance of such agreement, representing the Prentiss Lumber Company as solvent, and worth $100,000 over and above all of their

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liabilities, relying on which, they sold the goods upon credit. The only testimony introduced as to representations of Maltz concerning the credit of the company which induced the sale of goods upon credit was that of Mr. Greenbaum, and, as before stated, he testified that such representations, which induced the sale of goods on credit, were made in 1881 and 1882, as above stated. There is no testimony which tends in the remotest degree to support the claim asserted,—

"That there was an understanding and agreement between George Prentiss, representing the Prentiss Lumber Company, and George L. Maltz, representing the plaintiff in this suit, that Maltz, as president and general manager of the Alpena National Bank, should represent the Prentiss Lumber Company to be entirely solvent, and in good credit, for the purpose of getting credit, and of inducing the defendants to sell the company goods and take their notes therefor."

The only witnesses who testified upon that point were George Prentiss and George L. Maltz, and both denied that there ever was such understanding or agreement.

It must be further noted that there is no claim set up in this second defense, of fraud in obtaining the indorsements of Greenbaum and Epsteyn, or any inducement held out to them to indorse such notes. The only fraud alleged is—

1. The false representation of Maltz as to the Prentiss Lumber Company's credit, which induced defendants to sell the goods in the first instance.
2. A fraudulent agreement between Prentiss and Maltz that Maltz should represent the company to be solvent, and in good credit, for the purpose of inducing defendants to sell them goods, and take notes therefor.

The court, however, permitted testimony by Mr. Greenbaum, against the objection of plaintiff's counsel, of what Mr. Maltz said at the time the indorsements were made

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upon renewing the original notes, and also as to what was said a few days previous to the giving of the original notes. This testimony was, substantially, as follows:

That, in 1881 and 1882, Greenbaum and Epsteyn sold goods to George Prentiss, and took his notes, and after the Prentiss Lumber Company was formed they continued to do so; that the notes were payable to the order of Greenbaum & Epsteyn, and, after finding out if the bank would take them, they negotiated them at the bank; that when the firm dissolved, in April, 1883, the company was indebted to them, and they went to get their pay; that Prentiss, the president of the company, told them he could not pay them then, and referred them to Maltz about the solvency of the company before they took the note; that Greenbaum went to Maltz, and told him Prentiss offered him a note to wind up the business with the firm, and that he did not care to take the note, and that Mr. Prentiss told him to find out whether Maltz would discount it, and how the Prentiss Lumber Company stood; that Maltz told him that he could take the note; there was no risk about it; the Prentiss Lumber Company was good; that it was worth over a hundred thousand dollars; that the bank would discount it, and he would run no risk; that the note was all right, and the Prentiss Lumber Company was all right; that he relied upon what Mr. Maltz told him, and that, had it not been for the representations then made by Mr. Maltz, he would not have taken the Prentiss Lumber Company note.

That, just prior to the notes being renewed, he had a conversation with Maltz as manager of the bank; that he refused to indorse the renewal notes until Maltz told him the same thing,—that the Prentiss Lumber Co. was good, and he ran no risk, and that the renewal was only for the accommodation of Prentiss; that he could not pay it

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then, and would pay the interest; that the same thing occurred with reference to both renewals, and that he would not have renewed the notes, had not Maltz made those representations, upon which he relied; that he had no recollection of any conversation with Maltz at the time the notes were discounted, or when the renewals were made, but that these conversations were prior to those events; and that he had no conversation with Mr. Maltz at the time the notes in suit were indorsed.

This witness was examined, cross-examined, re-examined by his counsel, and again cross-examined by counsel upon the subject of the representations made by Mr. Maltz. The result of the whole is substantially stated above, with the exception that he stated upon a cross-examination that he did not apply to Mr. Maltz when Greenbaum & Epsteyn were selling the goods, but he did prior to taking the original note; that several notes, both of George Prentiss and the Prentiss Lumber Company, had been taken for the goods sold to the company, and had all been paid, except the two of which the notes in suit were renewals.

The court erred in his instructions as follows:

"Now, gentlemen, it cannot be disputed, under the evidence, that these representations, to which I have called your attention as being representations within the proper definition of the same, if they were used and made by Mr. Maltz, were untrue at the time."

It was not only disputed that Mr. Maltz made the representations, but it was disputed whether, if made, the representations were untrue. We may say that it appears beyond dispute that down to September 7, 1883, the Prentiss Lumber Company was in good credit, and was carrying on an apparently prosperous business. It was largely in debt, but it also had large assets; and, according to a statement made by Prentiss a few days prior to

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September 7, 1883, and put in evidence by defendants, its assets amounted on August 24, 1883, to $364,393, and its liabilities to $213,000, showing a balance of assets over liabilities of $151,393. No testimony was introduced to impeach the good faith of Prentiss in making this statement.

The defendants also introduced in evidence the annual report of the Prentiss Lumber Company for the year 1882, which showed assets at $210,172.91, and liabilities, $86,261.10; leaving a surplus of $48,886.81, after repayment of capital stock of $75,000, or a surplus of $123,866.81 as regards creditors of the company. The Alpena National Bank had, during the year 1883, made direct loans to the company of about $11,000; and Maltz, individually, had loaned it about $13,000. Five thousand of this sum Mr. Maltz had loaned on September 4, 1883. Neither the bank nor Maltz held any security for these loans, although Mr. Prentiss had said on two different occasions, when obtaining such loans, that he would give security if they asked it, or at any time when they would ask it; a statement not unusual between a customer and his banker.

During the summer of 1883 the Prentiss Lumber Company met with losses that aggregated about $64,000; and in the latter part of August it became aware of the extent of its losses, and it concluded to give the mortgages in question. It turned out, as is generally the case in winding up under the mortgages, and from a stoppage in business, that there was a great shrinkage between the values of the assets, as estimated by the company, and the price actually obtained on a sale and disposition of them by the trustee; but the evidence in the case did not justify the charge of the court in the remarks above quoted. Laying out of view entirely the testimony of Mr. Prentiss and of Mr. Maltz contradicting the state-

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ments of the witness Greenbaum, I do not think there is testimony in the whole record that warranted the court in submitting to the jury the question whether Mr. Maltz made to the defendant Greenbaum any false or fraudulent representations whatever. Fraud, in order to be actionable, requires proof. If representations were made, either falsely or negligently, it is not sufficient to show that the representations were made, but it must be proved that the representations were false.[1] This the defendants failed to do. I have reference now to the time when the notes of which the notes in suit were renewals were executed, and when defendants' liability first arose upon their indorsement.

The first error assigned upon the ruling of the court upon the admission of testimony relates to the introduction in evidence of a statement of the assets and liabilities of the Prentiss Lumber Company, dated August 24, 1883, and first shown to Mr. Maltz on the evening of September 7, 1883. This statement showed the assets to be $364,393, and the liabilities, $213,000; leaving a balance of assets over liabilities of $151,393. There could be no prejudicial error in admitting this statement. Its tendency was favorable to plaintiff. It showed that by the estimate and valuation placed upon the property of the company it was solvent, and that its assets largely exceeded its liabilities; and there is nothing in the testimony to show that Maltz knew, or had any reason to believe that the Prentiss Lumber Company was not solvent and in good credit down to September 7, 1883, when he was told by Prentiss of the embarrassment of the company. It had a tendency to rebut the fraudulent intent which the defendants claim Maltz had in representing the company solvent and in good credit.

The defendants' counsel asked the witness Maltz, upon

[1] See *People v. Reynolds*, 71 Mich. 343.

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cross-examination, whether he had some stock in the Prentiss Lumber Company, and he answered that he did not. He was then asked if $30,000 worth of stock was not carried along upon the books of the Prentiss Lumber Company for a year or more. He answered that he did not know. He was asked if he did not see it upon the books of the company upon the other trial of the case. He replied that he saw the item, but did not know what it was for. He further testified that the secretary of the company, a Mr. Billings, came to the bank, and desired to place $30,000 of stock in his hands, which he refused. He was asked why he refused it, and he replied that he did not desire it, that was all, from the fact that at that time he did not want to be considered a stockholder. Counsel then asked:

"Why didn't you want to be considered a stockholder?"

He replied:

"Because I was not going to put any money in that institution."

The following questions and answers were then asked and given:

"*Q.* About that time you were representing the Prentiss Lumber Company to be good and solvent, were you not?
"*A.* I believed then so, believe so still.
"*Q.* And, while you were making these representations, you did not want to be regarded as a stockholder with them?"

Counsel for plaintiff interposed an objection on the ground that it was incompetent and irrelevant. Plaintiff's counsel stated why he considered the testimony as irrelevant and incompetent; the principal reason being that, if such representations were made, they were not within the scope of the authority of Maltz, as president of the bank, to make. The court, in deciding upon the admissibility of the testimony, stated to counsel as follows:

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"So far as this point is concerned, I understand the object of the testimony, generally, to be an offer to show that while the plaintiff held the notes for which the notes in suit were given as renewal, and upon the question being presented of the proposed renewal, and the reindorsement by the defendants, being referred by the Prentiss Lumber Company, the principal maker, to the bank, or to Mr. Maltz, its president, Greenbaum went to Maltz; that Maltz, knowing the situation, and his bank having the notes for which these notes were given in renewal, and knowing that it was proposed to make these renewals in this way, by the indorsement of Greenbaum, made the statements to Greenbaum with reference to the responsibility of the Prentiss Lumber Company which you propose to introduce in evidence. Is that correct?"

Counsel for defendants, Mr. Shields, replied:

"I think that is a fair and accurate statement of it."

The court then said:

"Now, I am inclined to think that that testimony is admissible, at least within the limits I have stated; and I shall admit it. I think it quite distinguishable from the case of an agreement or statement on the part of a bank officer that an indorsement which it is proposed to make will not be insisted upon. This goes to the question of fraud in procuring an indorsement; not an agreement that a valid indorsement, upon its face, should not be enforced. It is not a question of an attempt to vary the conditions of a written agreement; but it is a question of fraud in the procuring of a written agreement; and it seems to me that the bank, if it procured, by fraud of its active agents in doing the business, the indorsement of Mr. Greenbaum upon this paper, cannot assert the legality of Greenbaum's indorsement upon the paper against its own fraud, or the fraud of its active officers, in procuring the indorsement. At least, within the limits I have indicated, I will allow the examination."

Although no answer was given to the question asked, yet, as the rule laid down by the court was acted upon to a large extent in the subsequent course of the trial, in the admission of testimony, and in his instructions to the jury, we may determine the correctness of such

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rulings upon this exception better than to take them up *seriatim*. If this testimony was admissible at all, it must have been under the issue raised by the second defense, above set forth. The theory and gist of that defense is that fraudulent representations were made by Maltz respecting the credit and responsibility of the Prentiss Lumber Company to the defendants, whereby they were induced to sell goods to that company, and take the company's notes therefor. Aside from the conspiracy clause, which is not attempted to be proved, this is the gist of that defense. There is not one word about false representations made by Maltz, subsequently to Greenbaum & Epsteyn's taking the notes, to induce them to indorse such notes, or a renewal thereof. The point of the judge's ruling is that the testimony was admissible to show a different fraud from that alleged,—in fact, to show a fraud not alleged,—relating wholly to representations made after the original notes were given, and while they belonged to the bank, which induced Greenbaum to indorse such renewal notes. I think such testimony was not admissible, under the pleadings.

In *Bourreseau v. Evening Journal Co.*, 63 Mich. 437, Chief Justice CAMPBELL, speaking for the Court, said:

"The practice is settled in this State, as at common law, that it is not competent to prove distinct facts in defense that have not been made part of the issue as framed. No one can be prepared in advance to anticipate every fact, true or false, which may be offered in evidence, and of which he has had no notice."

I am also of the opinion that, if the original notes were free from taint when the bank became the purchaser thereof, they could not be rendered void or worthless by what transpired at the time they were renewed by giving the notes in question. The renewals merely continued the original contracts in force during the period to which

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the time of payment was extended. The notes, originally, were not sold to the bank or discounted for the benefit of the maker. Greenbaum and Epsteyn were not accommodation indorsers. They sold the notes to the bank, and received the consideration. While this was the situation, the notes, upon their face, disclosed the fact that Greenbaum and Epsteyn occupied the relation of sureties to the maker; and the bank was therefore bound to respect their rights as sureties. It could make no change in the contract, to the prejudice of the sureties, without their consent. The only change made in the contract was an extension of time of payment, to which the sureties assented. They claim that the request for extension was made by the maker, and that they gave their assent by reason of the representation of the holder that the maker was good. If the representations were made to induce the indorsement of the renewals, and were false, how are the indorsers damnified? They claim that, if the extension had not been made, they would have been in a position to collect their debt by suit from the maker. To do this, they would have had to pay the notes to the bank, and then brought suit in the circuit court; and how is it made to appear that, before the judgment could have been obtained, the failure would not have occurred, and the property sold or mortgaged to other *bona fide* creditors? If the renewal notes were of no validity, the original notes remained in full force, and the indorsers were liable upon them. In other words, the representations, under the facts of this case, are not a defense which goes to the validity of the contract of indorsement; but, if it has any merit, it only goes to a recoupment, under proper pleadings, to the extent of the injury actually suffered by reason, or on account, of extending the time for payment.

The court erred in permitting defendant Greenbaum to

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testify to conversations which he had with Maltz, after the execution of the mortgages, to the effect that sufficient property was covered by the mortgages to pay all of the debts secured thereby, and that he need not have anxiety about his liability upon the notes in suit. Such testimony was irrelevant to any issue made in the case. The court admitted it as tending to show payment. It could have no such tendency, and was extremely prejudicial. No claim was made that Maltz had not sold all of the property covered by the trust mortgages, or that the total amount realized from such sales was not, as he testified, the sum of $112,320.33. This being so, the jury had no right to weigh his opinion of the value of the security against the results reached by a conversion of it into money, as evidence showing payment of the notes.

It was error, also, for the court to permit the witness Greenbaum to testify, against plaintiff's objection, to the effect that, if Mr. Maltz had not told him that he had sufficient property to cover the notes and pay them, he would have taken steps to collect the debt out of other property of the Prentiss Lumber Company. This testimony had no relevany to the issues being tried. Its only effect could be to prejudice the jury against the plaintiff, by drawing the attention of the jury away from the issues involved, and to lead them to think that defendants were injured by statements made by Maltz, but for which the plaintiff was in no way responsible. Such testimony was also inconsistent with the defendants' theory of the case. That theory was that defendants were not liable at all upon their indorsements, by reason of the fraud practiced by Maltz in procuring them. This testimony of Greenbaum recognizes their liability, and seeks to establish a discharge from liability by matters *ex post facto*.

The testimony of Andrew W. Comstock should have

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been excluded. He was a banker at Alpena. This leading question was asked him:

"In that conversation, did you say to him, in substance, that the Prentiss Lumber Company was bad, and soon would fail?"

The question refers to a conversation which the witness claims he had with Mr. Maltz in the spring of 1883, the date of which he does not fix. He replied that he did. He kept on discounting the notes of the Prentiss Lumber Company brought in by his regular customers, whom he knew were good. Whether he apprised his regular customers of the same advice he so kindly tendered to Mr. Maltz he does not state. The testimony was not admissible as evidence of the fact that the Prentiss Lumber Company was bad; for it is his opinion, merely, both of its badness, and that it would soon fail. He disclosed no knowledge of its affairs which would warrant him in expressing such opinion; and, if it was offered as notice which should have put Maltz upon inquiry, it should have been made to appear that the conversation was prior to April 23, 1883, when the second of the original notes bears date.

I am of opinion that the court erred in submitting the issues raised by the third defense to the jury. Both Mr. Prentiss and Mr. Maltz testified that there was no understanding or agreement between them that the bank should have security for the money loaned to the Prentiss Lumber Company by it whenever it requested such security. Mr. Prentiss testified that he casually remarked to Mr. Maltz at one or two times, when borrowing money:

"'Any time you want security on these direct loans, I will give it to you.' On one of these two occasions, I added: 'I will hold the mill property to see that you are taken care of.' That was all the agreement, and all the understanding, in those same two remarks of mine.

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Mr. Maltz never asked it, nor was there any further conversation about, or reference made to, it."

The witness was asked:

"*Q.* Did George L. Maltz, or the Alpena National Bank have any security on any property of the Prentiss Lumber Company on the 23d day of May, 1883?

"*A.* I don't remember that they did. Mr. Maltz had my word that I would, for money that he and the bank might advance, hold the mill property for security for it. He had my word for it, and nothing else."

Mr. Maltz testified upon the subject as follows:

"*Q.* Had you, or the Alpena National Bank, any security in the summer of 1883?

"*A.* No, sir.

"*Q.* Had you assurance from the Prentiss Lumber Company that, when asked for, you should have security?

"*A.* Yes, sir.

"*Q.* And when were those assurances given you?

"A. Mr. Prentiss said, any time I wanted security, he would give it to me.

"*Q.* Give it to you, or to the bank?

"*A.* I don't know whether it was to the bank or not. It was in a conversation with me.

"*Q.* Whatever advances you made, of course, would be in behalf of the bank?

"*A.* Yes, sir.

"*Q.* So that this security talked about was intended to be given to the bank whenever asked by you?

"*A.* Yes, if I wanted any additional security.

"*Q.* In point of time, when was this assurance given you?

"*A.* I suppose I could have it at any time.

"*Q.* That was the understanding and agreement with you, all the way from 1883, was it not?

"*A.* There was no agreement; but, if I should go to him, and want security, he would give it to me.

"*Q.* You had that understanding and assurance from Mr. Prentiss from the beginning of the Prentiss Lumber Company, had you not?

"*A.* It may be. I don't remember distinctly about it."

The foregoing is, substantially, all of the testimony from which it is claimed the jury would be warranted in

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finding that there was a secret agreement which had the effect to discharge the indorsers, and forms the basis for the following instructions of the court to the jury:

"As to the defense based upon alleged secret agreement, the defendants claim as a defense, substantially, that, at and previous to the time these indorsements were made, there was a secret understanding between the plaintiff (made for it by its president, Mr. Maltz) and the Prentiss Lumber Company that, whenever the plaintiff should ask or demand it, the lumber company would give security upon its property, or turn the same over absolutely to the plaintiff or Mr. Maltz, as its general officer, to satisfy any claim the bank might have, and that the transaction of September 7, 1883, was the execution of that agreement; that when the defendants made the indorsements in question the Prentiss Lumber Company was largely indebted to plaintiff; that these facts were concealed from the defendants when the defendant Greenbaum consulted Mr. Maltz as to the prudence of making the renewals in question; and that if they had been disclosed to him at those times, and on those occasions, he would not have made the notes or the renewals.

"Now, gentlemen, to maintain this defense, the defendants have the burden of showing, by the preponderance of the evidence, every fact essential to constitute it. It must appear from the evidence that such an agreement or understanding existed, as a matter of fact, at the time the indorsements in question were made. If there was no agreement or understanding, the basis of his defense is wanting. It need not have been in writing, or even put into any distinct form as to details, but the substance of it must have been understood between them. The minds of Mr. Prentiss and Mr. Maltz must have met upon it, and they must have made it the basis of their action; and the two mortgages of September 7, 1883, must have been made in pursuance of it. It must also appear that before asking the indorsements, and while the alleged agreement existed, Mr. Greenbaum applied to Mr. Maltz for information upon which to determine whether or not he should indorse these renewal notes."

There is nothing in the testimony tending to show a secret agreement which was a fraud upon the creditors of the Prentiss Lumber Company. Nor is there any prin-

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ciple of law which made it the duty of the Alpena National Bank to disclose to such creditors the fact that the Prentiss Lumber Company was a debtor to the bank, and that it had offered to give security whenever requested. There are no such overstrained and refined relations between a bank and its customers. Good faith and fair dealing is all that is required of a creditor in his transactions with a debtor who occupies the position of surety to a contract. Good faith and fair dealing do not require the creditor to inform such surety of other and independent transactions with the principal debtor. The notice of the third defense does not set up that any representations were made to induce Greenbaum to take notes, or renew notes already given; but it relies on a fraudulent concealment of the indebtedness, and the agreement to secure it, if requested. To hold that, when an indorser of a note applies to have it discounted for his own accommodation, the silence of the bank or purchaser as to the indebtedness of the maker of the note to him, and of the maker's assurance that he will give security if required, is a fraud upon the indorser which will enable him to keep the consideration received for the note, and discharge him from all liability, is a doctrine too palpably absurd for serious consideration.

The testimony of Mr. Maltz is to the effect that the bank was not intended, by the transaction in which security was taken, to be a trustee, and in this he is supported by Mr. Prentiss; and there is nothing in the testimony contradicting their statements. It has never assumed to act as trustee, while Mr. Maltz was named as trustee in the instruments creating the trusts, and has acted as such. He was asked:

"Since the giving of the mortgage referred to, and the real-estate mortgage, state whether or not the Alpena National Bank, through its officers or directors, as such,

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have assumed to have anything to do with the controlling or disposal of that property."

He replied:

"The Alpena National Bank has had nothing to do with the disposal of the property, or the control, or anything connected with the trust."

He further testified that he alone had the exclusive management and control of it; that the bank was in no way connected with, or interested in, the mortgaged property, or in the transaction, save as a creditor; and that the money into which the property had been converted remained in his hands subject to distribution as a trust fund.

It appeared when the case was here before that all money collected by the trustee had been paid over to the bank, and that there was a sufficient sum paid to satisfy all claims secured by the mortgages. Upon that state of facts, we held the notes in suit satisfied; for, if plaintiff was allowed to recover under such circumstances, defendants would be entitled to the benefit of the money paid into the plaintiff's hands for the purpose of discharging these claims. It now appears that the trustee paid into the bank, from the money collected, sufficient to pay the claims preferred in the mortgage over the last class, which embraces the claims in suit, and for the money properly applicable to the payment of the last class of claims he held certificates of deposit in his own name. Under these facts, as they now appear, the bank cannot be held as a trustee of these creditors to the amount of money so deposited. To hold the bank as trustee, simply because its president and financial manager was a trustee for the benefit of creditors, would operate harshly and unjustly upon the rights of a majority of the stockholders of the bank, and make them pecuniarily responsible for acts which neither they nor the board of directors of

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the bank ever authorized or assented to, and would unjustly condemn them to losses concerning which they have never had a hearing in a court of justice. I cannot reconcile the idea with due process of law.

If it be true that enough money was not realized to pay all classes of creditors mentioned in the mortgage in full, then Mr. Maltz was justified in not making a *pro rata* distribution until the question of the validity of the defendants' indorsement should be determined. If these defendants are not entitled to be discharged absolutely from all liability by reason of the fraud and deceit set up in their notices under the general issue, which, by this record, we do not think they have maintained by legal and proper testimony, the proper method for them to pursue would be, if they believed the trustee has not faithfully executed his trust, to file a bill in chancery for an accounting, in which suit the whole matter of the proper execution of the trust can be gone into, and the trustee charged with all proper items. The bank can be made a party defendant; and, if a proper showing can be made, it can be enjoined from the further prosecution of this suit until such accounting is had.

The judgment of the circuit court should be reversed, and a new trial ordered.

LONG and GRANT, JJ., concurred with CHAMPLIN, C. J.

MORSE, J., (*dissenting*). When this case was here before, the testimony of George L. Maltz, the principal manager of the plaintiff, and its chief witness, carried the impression and conviction to us that there was deposited in the plaintiff bank sufficient funds derived from the trust mortgages, of which Maltz was trustee, to pay in full the class of notes to which these in suit belonged. We were strengthened in this conviction by the brief of plaintiff's counsel, which plainly carried the same impres-

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sion. We then held that the money thus received on these mortgages by Maltz, and held by him on deposit, in his individual name, in the Alpena National Bank, was, by the terms of his trust, applicable to the payment of these notes, and must be so applied; that the money belonged to the bank, to be applied for this purpose, and in law would be considered as so applied. We then understood, as the case appeared in the record, and as it was argued, that such application was refused, not because there were no funds left from the trust to pay the notes, but because the bank entertained the idea that it could not apply the money in Maltz's hands, and deposited in his name, until he saw fit to pass the money over to the bank, which it claimed had not been done.

Under these circumstances, we held that, when the means were in the hands of the president and real manager of the bank, Maltz, and needed only entries on the proper books to transfer the account, the bank had no right to delay such action, and was bound to collect and apply the money. We further said, in reversing the case and granting a new trial, that there was no occasion or reason for going through another trial, which would be a wrong to defendants, who ought not to be harassed further. *Alpena Nat'l Bank v. Greenbaum*, 74 Mich. 157. A motion for rehearing was subsequently made; but, upon such motion, we saw no reason for changing our views entertained at the first hearing. Id. 159. Since then a change of venue has been taken to the Ingham circuit court, and a trial there had, resulting in a verdict for defendants. The plaintiff now comes to this Court, alleging certain errors upon the trial.

The counsel for the defendants, in his argument here, first meets these assignments of error by the contention that the testimony upon the second trial was substantially

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the same as upon the first, and is therefore governed by the law as laid down by us when the case was first here. But I am satisfied, from the record of the last trial, that the plaintiff attempted, in view of our opinion, to claim that there were not sufficient funds derived from the mortgages to pay the class of indebtedness in full to which the notes sued upon belonged; and Maltz testified on this trial that February 15, 1886, there was paid over to the bank by himself, as trustee under these mortgages, the sum of $13,842.65, to apply on the last indebtedness specified in said mortgages, to wit:

"Also, the remainder of the indebtedness to the Alpena National Bank, about the sum of $59,000, and arising from paper of first party held by said bank."

It will be remembered that this suit was brought by the Alpena National Bank, against the defendants, upon two certain promissory notes made by the Prentiss Lumber Company to the order of John C. Comfort, cashier of said bank, which notes were indorsed by the defendants. These notes came under the provision of the mortgages from the Prentiss Lumber Company to Maltz, as trustee, and therefore, when upon the stand as a witness for the bank at the last trial, Maltz testified that the proportionate share of this $13,842.65 to be indorsed on these notes as of the date of February 15, 1886, would be $273.35 upon one, and $309.79 upon the other; that the indorsements had never been made, but that the bank now made it as of the date above; that it had not been indorsed before because he did not suppose it could be done until after the decision of the Supreme Court after the first trial. He computed the balance due upon both of the notes after such indorsement, and at the date of the last trial, to he $2,473.87; and the plaintiff claimed judgment for this amount. Maltz also testified that he received, all told, in money, from the property described

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in the mortgages, the sum of $112,320.33. He paid all the indebtedness under his trust in full except this last class of $59,000.

The mortgages specified the following indebtedness to be paid out of the proceeds of the property mentioned in, and conveyed by, the mortgages, and in the order named, to wit:

George L. Maltz	$ 13,000 00
Labor account	10,000 00
Alpena National Bank, direct loans and paper indorsed by A. R. & W. F. Linn or George Prentiss, estimated, about	21,535 75
Perry Prentiss	1,500 00
Hubbell, Brown & Co	2,000 00
Pierce & Coleman	7,500 00
Mary C. Prentiss	2,700 00
Rectina P. Chase	186 00
Last Class	59,000 00
Total	$117,421 75

The mortgages, two in number, were dated September 7, 1883, and provided that interest at 7 per cent. per annum should be paid on these sums until paid. It is contended by the counsel for defendants that the evidence shows that George Prentiss, of the Prentiss Lumber Company, himself paid the paper indorsed by A. R. & W. F. Linn & Co., which in one of the mortgages is stated to be the sum of $3,035.75, and that there is also evidence showing that the amount of the indebtedness to which the notes in suit belonged amounted only to $50,910; that this evidence is found in Maltz's testimony, where he states the notes held by the bank under that class. It is also claimed that Maltz's testimony shows that the amount of the direct loans of the bank to the Prentiss Lumber Company was only $11,000; that this testimony, with the testimony of Prentiss that he paid the paper indorsed by the Linns, reduces the item of—

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$21,535.75 to	$11,000 00
Add Maltz's claim	13,000 00
Labor account	10,000 00
Prentiss, Hubbell, Brown & Co., Pierce & Coleman, Mary C. Prentiss, and Chase	13,886 00
Last Class, instead of $59,000	50,910 00
Makes total of claims to be paid by Maltz, not counting interest	$98,796 00

Maltz admits that he received in actual cash, and paid into the bank, $112,320.33. Upon examining the record, I find that Prentiss testified that he paid A. R. & W. F. Linn, but that the amount so paid was not over the $3,035.75 mentioned in the second mortgage. There must have been, from Maltz's and Prentiss' testimony, other paper, indorsed by the Linns or George Prentiss, that was not called "direct loans." It is true that Maltz swore that the direct loans only amounted to $11,000, but we do not think that this is all that the bank should be credited with as belonging to the $21,535.75 item. In the first mortgage the direct loans and paper indorsed by the Linns and George Prentiss were estimated at $21,535.75, and the other indorsed notes at "about $59,000;" making a total of paper held by the bank of $80,535.75. In the second mortgage, it is stated differently, to wit:

Indebtedness to Alpena National Bank	$77,500 00
A. R. & W. F. Linn	3,035 75
Making same total as above	$80,535 75

From the evidence in behalf of plaintiff, we can only deduct the Linn matter, $3,035.75, from the $21,535.75, leaving $18,500 on this item, or $7,500 more than claimed by defendants' counsel.

As to the notes belonging to the $59,000 class, Maltz stated on direct examination, in rebuttal of defendants' case, that he computed that on February 15, 1886, they amounted, interest and all, to $59,601.27, about $25,000 of which sum was contested, and in suit against the dif-

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ferent indorsers; but on cross-examination, when called upon to give the respective face amounts of these notes in detail, they foot up only $23,445. He states that he has given them all, and that they amount to $27,000. In making this last statement, he must have meant that the interest and principal amounted to this latter sum. He then goes on and gives the face amount of all the remaining notes in this class, which foot up, as I add them, a total of not over $27,280, making a total of $50,725; but I will call it $50,910, as figured by defendants' counsel. Adding $7,500 to the counsel's total of $98,796, I find the face value of the indebtedness to be paid under these mortgages to be $106,296. This deducted from the $112,320.33 deposited by Maltz with plaintiff, there is left the sum of over $6,000 to be used on interest account. This ought to have taken care of the interest. The proofs show (Maltz's testimony) that the lumber, $37,998.02, was sold, and the cash received, in September, October, and November, 1883, and May, 1884. The logs—$36,638.55—were sold, and cash received, in October, November, and December, 1883, and in 1884 and 1885. These moneys should have been applied on the debts, in their order, as fast as received.

It must be remembered that these mortgages were made September 7, 1883, and Maltz testifies that this bank paper was not all due at that time. The notes had been discounted, and there was no interest upon them until due, and some of them were four-months notes. It is not probable that any interest was paid on the labor account of $10,000. It also appears from Maltz's testimony that many of these notes belonging to the $59,000 class were paid when due by the indorsers,—at least the sum of $9,500,—upon which no interest has ever run, the bank having had the use of the money ever since. Maltz testifies as follows:

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"*Q.* So, during all that time, from the first sale of lumber, this money was in the Alpena National Bank, was it not?

"*A.* Yes, sir; under my care.

"*Q.* In use by the bank?

"*A.* Yes, sir,"—showing that, as fast as he collected this money under these mortgages it was placed in the bank, and used by plaintiff; and yet he also swears:

"*Q.* And, after all, you have charged up here interest on these accounts from the 7th of September, until the 15th day of February, 1886, have you?

"*A.* I did."

I am not entirely satisfied with the case as it was made in the circuit court. Mr. Maltz showed by his own testimony that he had received over $112,000 in money from these mortgages,—more than enough to pay all the indebtedness secured. Under our ruling in the case when it was here before, the money so received, although credited to Maltz's personal account, was considered as belonging to the bank, to be applied on its debt. This must remain the law of the case. Therefore, the burden was on the plaintiff to show that the debts amounted to more than the money received, or some other good and sufficient reason why the $112,000 was not sufficient to pay the whole indebtedness. Mr. Maltz, as a witness, was speaking for the bank; and he testified on the last trial that he was not only president, but the manager, of the bank; and that when he was present he controlled its daily business. As a trustee under these mortgages, and as the manager of the bank, it was his duty to show what payments he had made, and when, under such trust. Instead of that, he contents himself with stating that he has paid in full all the indebtedness excepting this $59,000 class, and that has left only about $13,000 to pay on that. Plaintiff's counsel contend that it was not the duty of the bank to show that Maltz had performed his trust, or how he had performed it; but I think differently.

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The money, as collected, was paid into the bank, and was disbursed through the bank; and the plaintiff's own books would show the whole transaction. We held before that when the money was paid into the bank it belonged to the bank, and was its money, and that it was its duty to at once apply it to the payment of its debts. I am not inclined to now hold differently.

No explanation is given why there is now a deficit of over $40,000 in this fund, or where it has been applied. Mr. Maltz simply appears upon the stand as a witness for the bank, and testifies that "the trustee" (himself) has paid over only $13,842.65 to apply on this class of indebtedness, and that was the balance left in his hands to so apply after paying the other indebtedness in full. The counsel for the plaintiff appreciate the situation, and in their supplemental brief and argument admit that there was no effort in the court below to arrive at a fair and full accounting, because the plaintiff claimed it was not competent to do so, and the defendants did not attempt it; and it is then suggested that this balance might have been used by the trustee in paying off prior incumbrances and liens upon the trust property. The counsel then proceeded to state, as upon their personal knowledge, the expenditures of Maltz in the performance of his trust, to wit, $36,457.36, for taxes, counsel fees, insurance, and the relieving of liens upon the property, and also that the debts paid in full amounted to nearly $4,000 more than appears upon the face of the mortgages. But Maltz or the plaintiff failed to make any such showing upon the trial, or even to hint at it.

I can see no good reason why a trustee who has honestly and faithfully performed his trust should hesitate to account fully and freely to the beneficiaries of such trust, and in law there is none. The defendants in this case were interested in the fund derived from these

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mortgages, and entitled to know what had been done with the moneys collected therefrom. The books and all the *data* showing the collection and disbursements of this fund were in the hands of Maltz and the bank; and the defendants could have but little, if any, information in regard to these moneys, and whether or not they ought to pay anything upon these notes, or, if anything, what amount, except through Maltz and the bank. The facts in this case show over $112,000 in the hands of the bank, to be applied for a specific purpose. The knowledge and information as to what has been done with this money is entirely with the bank, and its agents and officers. The bank is in full possession of all the proof to show that this money has been rightfully expended, and how; and, failing to make this showing, the law will not presume that they have done so. *People v. Swineford*, 77 Mich. 573.

This is a stronger case, at law, than the one above cited; for here not only is the money shown to have been in the hands of the bank, but the burden of proof rested upon the plaintiff to show that this fund was not sufficient to pay these notes sued upon in full, and why it was not sufficient. But this it signally failed to do; and the bare assertion that only about $13,000 was left to apply on the $59,000 class of notes will not do, unless the deficiency between the $112,000 and the face of the debts mentioned in the mortgages is satisfactorily accounted for. This has not been done, by any means, nor has any attempt been made to do so; but, on the contrary, such a showing has been studiously avoided, not only on the last trial, but from the very beginning of this litigation. When the money was all collected, on February 15, 1886, nor at any time thereafter, was any showing of the disposition of this fund made to the defendants; but suit is brought against them for the full amount of the notes

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and interest, and no hint even given them that there was any indorsement to be made upon them. And yet Maltz now testifies that they were on February 15, 1886, entitled to the indorsements made on the last trial, and so entitled long before the time of bringing this suit.

The bank obtains judgment on the first trial for the full amount of said notes and interest,—some $600 more than it now admits it ought to have had; and, had the case not been appealed to this Court, the judgment would, for all we know, have been collected of defendants. The judgment is reversed by this Court, with a pretty plain intimation that we can see no reason, upon the showing then made, why the defendants should be further harassed. The suit is, however, tried again; and yet no accounting made that is "fair and just," as admitted by the plaintiff's counsel upon the argument here. I do not think it is necessary to give the plaintiff a new trial, that it may now make the accounting which it has hitherto refused or neglected to do. From the plaintiff's own witnesses, I think it is shown by this record, beyond cavil, that the bank has received more than sufficient money upon these mortgages, had it been properly applied as fast as received, to pay the whole indebtedness secured by them, and that no explanation has been given why such money did not pay the entire debt so secured.

The case stands practically as it did before; and the jury rightfully found, under the law as laid down by this Court, that the notes sued upon were paid in full before suit brought. As the circuit judge would not have erred had he, at the close of the trial, directed a verdict for the defendants, the allegations of error assigned are immaterial. If any errors were committed as claimed, none of them could possibly have affected the result. None of them went to the main question of the payment of these notes, and the verdict of the jury can

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well be sustained upon plaintiff's own showing, independently of any testimony introduced on behalf of defendants.

I read the record differently from my brethren; or, rather, come to a different conclusion from reading it. I cannot divest myself of the conviction that, in this whole business, George L. Maltz and the Alpena National Bank were practically one and the same, and that it should be so treated at law. This was the conclusion we all arrived at upon the first record, and the second reading of the case here has but confirmed my first conviction.

The judgment ought to be affirmed.

JOSEPH C. FORD, EXECUTOR, ETC., v. MARCUS C. FORD, IMPLEADED WITH MARGARET G. FORD ET AL.

Estates of deceased persons—Construction of foreign will—Equitable conversion—Perpetuities.

1. Under the provisions of How. Stat. § 5808, providing for granting letters testamentary on the proof of foreign wills, the estate must be disposed of in accordance with the directions contained in the will.
2. In administration proceedings under a foreign will admitted to probate in this State, the construction placed upon it by the proper court of the state where the testator resided will be adopted by our courts, unless it can be clearly gathered from its terms that the testator had in mind the laws of this State, or used language necessarily referring and only appropriate to this State.
3. Where a will directs the testator to convert certain real estate in one state into rentable "inside" property in a specified city in another state, as soon as practicable after the testator's death, irrespective of all contingencies, an equitable conversion of said real estate is effected by the terms of the will.

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4. Double conversion does not differ from single conversion, but the property is treated as if already converted into that species of property into which it is directed to be changed, no matter whether the steps are more or less numerous.
5. The object of How. Stat. § 5531, which prohibits the suspension of the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, was to prevent the accumulation of large landed estates to be held in perpetuity, or for a long series of years, and said statute is not violated by the direction in a foreign will, admitted to probate in this State, that Michigan lands shall be sold, and the proceeds invested in lands in another state, there to be held for any number of lives.

Appeal from Kalamazoo. (Buck, J.) Argued January 15 and 16, 1890. Decided April 11, 1890.

Bill to construe will. Defendant Marcus C. Ford appeals. Affirmed. The facts are stated in the opinion.

E. M. Fish (*Irish, Knappen & Frost* and *I. C. Sloan*, of counsel), for complainant.

Pinney & Sanborn and *Osborn & Mills*, for defendant Marcus C. Ford.

Gregory & Gregory and *J. L. Hawes*, for defendants Trustees of Hamilton College.

LONG, J. The bill is filed in this cause by Joseph C. Ford, as executor of the last will and testament of Francis F. Ford, deceased, to determine the power of the executor under such will to sell certain lands situated in this State. The will reads as follows:

"Know all men by these presents, that I, Francis F. Ford, of the city of Madison, county of Dane, and State of Wisconsin, being of sound disposing mind and memory, do make, publish, and declare this to be my last will and testament, in terms following, to wit:

"1. I direct that all my lawful debts, funeral expenses included, shall be paid as soon after my decease as practicable, out of moneys on hand, or, if need be, from the income of my estate.

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"2. It is my will, and I so direct, that the necessary expenses of carrying my estate from year to year be paid from the income thereof.

"3. It is my will, and I so direct, that all indebtedness from any of my brothers to me shall be, and hereby is, canceled, and the legal evidence of such indebtedness shall be returned to the makers thereof.

"4. I direct that all properties in Schedule A attached to this instrument, and bearing my signature, shall be converted, as soon as practicable after my decease, into rentable 'inside' property in Kansas City, Mo., at schedule prices, or as much better as may be.

"5. I also direct that the several properties in Schedule B attached to this instrument, and bearing my signature, shall, at the discretion of my executors, either be sold, and the proceeds thereof be invested in more desirable renting property in Kansas City; or said proceeds be used in improving some one or more of my Kansas City properties.

"6. I also direct that all moneys, notes, bonds, mortgages, or other evidences of indebtedness to me from any and all parties, except my brothers, shall, as soon as practicable after my decease, be used either in the purchase of property in Kansas City, or for improving properties in said city then on hand.

"7. It is my will, and I so direct, that my wife, Maggie, shall have the use of my homestead, furniture and appurtenances, located on Spaight street, Madison, Wis., so long as she may desire to live in it as her home. In case at any time she shall cease to desire it as her home, I direct that as soon thereafter as practicable it be sold at a price not less than ten thousand dollars ($10,000), or as much more as the property will bring, and the proceeds thereof be invested in good rentable property in Kansas City, Mo., and the rentals of such property be added to the income of the estate.

"8. It is my will, and I so direct, that, in addition to the use of said homestead and furniture, my said wife, Maggie, shall have one-quarter of the net annual income of the remainder of my estate during her natural life, subject to modifications in article 12 of this instrument. And it is expressly stipulated that the above bequests to my said wife are in lieu of dower.

"9. It is my will, and I so direct, that my son, Marcus C. Ford, shall have one-quarter of the net annual income

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of my estate (homestead not included) until such time as, in accordance with the provisions of this will hereinafter named, he shall come into possession of the entire estate; but the expenditure and use of said income during his minority shall be under the control and direction of his guardian. And I appoint his mother his guardian during his minority, and, in the event of her death, I appoint my brothers Edward I. and Henry T. in her place.

"10. It is my will, and I so direct, that my brother Edward Irving shall have one-quarter of the net annual income of my estate (homestead not included) during his natural life.

"11. It is my will, and I so direct, that my brothers Joseph C. and Henry T. shall each have one-eighth of the net annual income of my estate (homestead not included) during their natural lives.

"12. It is my will, and I so direct, that when my son, Marcus C., reaches his majority, he shall become the owner in fee of ten thousand dollars ($10,000) worth of my real estate; and at twenty-five (25) years of age he shall have an additional twenty thousand dollars ($20,000) worth of my real estate; and at thirty (30) years of age he shall have an additional twenty-five thousand dollars ($25,000) worth; and at thirty-five (35) years of age he shall have an additional forty-five thousand dollars ($45,000) worth; and at forty (40) years of age the remainder of my estate shall become his. And I also direct that the income of my said wife, Maggie, shall be kept up to fifteen hundred dollars ($1,500); any deficit to be taken from the income of my son, Marcus C.; and, as an offset thereto, my son, Marcus C., shall be entitled to any excess in said wife's income over twenty-five hundred dollars ($2,500) a year.

"13. I also direct that, in the event my son, Marcus C., shall decease after reaching his majority, leaving one or more legitimate children of his body, that the income of forty thousand dollars ($40,000) worth of my estate, or so much thereof as may in prudence be necessary, shall be used for the proper support of such child or children until they shall severally become of legal age, when an equal part of the above-named principal and accrued interest shall become his or hers absolutely.

"14. In the event that my son, Marcus C., shall survive all my other legatees, and then die before coming

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into possession of my whole estate, it is my will, and I so direct, that the remainder of my estate, as of that date, shall belong to the Hamilton College, located at Clinton, New York, to be used in the endowment of some new professorship, and the remainder to be used at the discretion of the trustees of said college, in the erection of some building for college uses, or the endowment of additional professorships; such buildings or professorships to bear my name.

"15. If either my wife, Maggie, or one of my brothers, shall become my only surviving legatee, it is my will, in that event, and I so direct, that my estate at that time be divided as nearly as may be into two (2) equal parts, as regards the value and renting power, and said wife or brothers shall then choose between the income of said (2) properties, and have and enjoy the same during his or her natural life. And it is my will that the other part of my estate shall at that date become the property of Hamilton College to be used as directed in article fourteen in this instrument. And I further direct that, at the death of said wife or brother, the remaining part of my estate shall become the property of Hamilton College, to be used as in article fourteen.

"I hereby appoint my two brothers, Joseph C. and Henry T. Ford, as executors of this my last will and testament."

The Michigan lands are described in Schedule A, referred to in the will, as follows:

"KALAMAZOO PROPERTY, MICH.

"No. 2. All of block 7, except north half of lots 3 and 4; also the north half of lots 1 and 2, in block 4; together with all the buildings, machinery, tools, engine, boilers, and fixtures thereon, and whatever else may belong to me. Value of all property in block 7, $25,000. Estimated value, $40,000. Value of property in block 4, $2,000. Estimated value, $3,000."

The testator, Francis F. Ford, was a resident of and domiciled in the county of Dane, state of Wisconsin, at the time of the execution of the will, and at the time of his decease, January 26, 1886. He left surviving him his widow, Margaret G. Ford, his son, Marcus C. Ford, then about twelve years of age, and three brothers, Edward

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Irving, Joseph C., and Henry T. Ford. The will heretofore set forth was admitted to probate in the county court of Dane county, May 17, 1886, and letters testamentary issued to Joseph C. Ford, one of the executors named in the will, who accepted and duly qualified as such. The other executor named in the will, Henry T. Ford, did not accept the trust. The executor, being in doubt as to the meaning and validity of some of the provisions of the will, brought an action in the circuit court for Dane county, Wis., which was taken by appeal to the supreme court of that state, and by that court the will was construed in most of its provisions. That case is reported in 70 Wis. 19 (33 N. W. Rep. 188).

The executor subsequently took proceedings in the probate court of Kalamazoo county, in this State, under How. Stat. § 5805, for the probate and allowance of the will in this State, and in which court the will was duly admitted to probate. The widow, Margaret G. Ford, renounced all claim under the will, and elected to take under the statute. This was done in writing, and filed in the probate court of Kalamazoo county, as provided by our statute. This bill was filed in the circuit court in chancery of Kalamazoo county, to determine the power of the executor to sell the lands so situated in that county. The parties to the proceedings taken in Wisconsin are the parties to the present bill.

On the hearing in the court below, it was adjudged and decreed that,—

"The real estate described is vested in complainant, Joseph C. Ford, as sole executor of said will, as trustee, subject to the right of dower in said land of defendant Margaret G. Ford, as widow of said testator; that said executor has power, and is authorized as executor and trustee, to receive the share of the rents, income, and profits thereof belonging to said estate; that as such executor and trustee he has power, and is authorized and

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directed, to sell said real estate at the best price he can obtain therefor, subject to the dower right of said Margaret G. Ford, and convert the same into money, and out of the rents, income, and proceeds of said real estate to pay all claims that have been proved before the commissioners of said estate, and reported by them to the probate court of Kalamazoo county.

"It is further ordered that said bill be dismissed, with taxable costs, as to defendant Grace P. Ford, and that the defendants Margaret G. Ford and trustees of Hamilton College do recover their costs to be taxed, to be paid out of said estate."

From this decree the defendant Marcus C. Ford alone appeals.

Complainant, as well as the defendants Marcus C. Ford and trustees of Hamilton College, appeared in this Court by counsel, and the cause has been very fully argued here by able counsel of Wisconsin, as well as of this State, and we have the benefit of their views in the determination of the questions presented for our consideration.

It is contended here by counsel for the appellant:

1. That the provisions of the will creating the trusts illegally suspend the absolute power of alienation for a longer period than is prescribed by the laws of Michigan.

2. That the trust attempted to be created by the fourteenth and fifteenth paragraphs of the will is a trust prohibited by the laws of this State, and that the provisions of the will in favor of Hamilton College are void.

It is further contended by counsel for appellant that the direction to sell contained in the fourth paragraph of the will is not absolute and unconditional, and therefore wrought no change in the legal character or *status* of the lands in this State.

The fourth paragraph of the will reads as follows:

"I direct that all properties in Schedule A attached to this instrument, and bearing my signature, shall be converted, as soon as practicable after my decease, into rentable 'inside' property in Kansas City, Mo., at schedule prices, or as much better as may be."

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Schedule A, referred to in this paragraph, includes these Michigan lands. The supreme court of Wisconsin, in the case above referred to, and in the subsequent case of *Ford v. Ford*, reported in 72 Wis. 621 (40 N. W. Rep. 502), gave a construction to the will in question, so far as ascertaining the true intent and meaning of the testator, and in this consideration gave construction to the fourth paragraph above quoted. It was said by the court (70 Wis. 50):

"The scheme of his will indicates an intention to have his lands in Michigan and Kansas sold as soon as practicable, and the proceeds thereof invested in real estate in Kansas City. * * * Some discretion may be given as to the time or times of making such sales and investments, without preventing the application of the doctrine of equitable conversion. The only purpose manifest in the will for selling any of the Michigan or Kansas lands is to invest the proceeds of such sales in real estate in Kansas City, and then to hold such lands in that city as a part of the estate during the time and for the purposes indicated in the will. If such permanent investment can be lawfully made, and such lands so lawfully held, then we discover no reason why the doctrine of equitable conversion should not apply to them."

It was further said by the learned judge who wrote that opinion:

"What has been thus said is not by way of determining the validity of the title to any lands outside of Wisconsin, nor the validity of any investment or trust in or tenure of such lands, but merely to ascertain the meaning and intent of the testator from the language employed in the will, which, as we have seen, is a duty devolving upon this jurisdiction."

Thus it will be seen the court of Wisconsin acted upon the assumption that it was the duty of that court to absolutely construe the will of the testator, he being domiciled in Wisconsin, not only as to the real and personal estate situate in Wisconsin, but also as to the realty,

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wherever situated, so far as to ascertain the true intent and meaning of the testator in making disposition of his whole estate, although holding that the validity of the provisions, with reference to lands in other jurisdictions, must be determined by the courts sitting within those jurisdictions. The testator at the time of the execution of the will, and at the time of his death, was domiciled in the state of Wisconsin, and the will was originally admitted to probate in the courts of that state; the proceedings in this State for the probate of the will being, under our statutes, only ancillary.

It is provided by How. Stat. § 5808, that–

"When any will shall be allowed as mentioned in the preceding section [the preceding section has reference to the probate of foreign wills within this State], the probate court shall grant letters testamentary or letters of administration with the will annexed; and such letters testamentary or letters of administration shall extend to all the estate of the testator in this State; and such estate, after the payment of his just debts and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it; and the residue shall be disposed of as is provided by law in cases of estates in this State belonging to persons who are inhabitants of any other state or country."

Under the provisions of this statute, the estate must be disposed of in accordance with the direction contained in the will. Are we, then, to take the will in this State, under this ancillary proceeding, and construe it, as to the true intent and meaning of the testator, as an original question, and without reference to the decision of the domiciliary court, or must we be guided by the construction as to the meaning of the testator by the interpretation given it by that court?

In our view of the case, the question does not become of much importance, but we think the law well settled that, the meaning and intent of the testator having been

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settled by the domiciliary court, the courts in foreign states and countries will be guided by such construction, unless it can be clearly gathered, from the terms used in the will, that the testator had in mind the law of the place of the *situs*, or used language necessarily referring to the usages and appropriate only to the *situs*. This seems to be the settled rule in England, as well as in this country. *Trotter v. Trotter*, 4 Bligh (N. S.), 502.

In *Boyes v. Bedale*, 1 Hem. & M. 805, the vice-chancellor, speaking of this rule, says:

"The rule applied is in fact nothing more than a branch of the larger rule by which the *lex loci contractus vel actus* is held to govern questions of construction, and it rests on the common-sense view that a testator may well suppose that his language is to bear the sense which it has according to the law of the country where he is domiciled."

Story, in his Conflict of Laws, § 479*a*, says as to wills:

"The general rule of the common law is that it is to be construed according to the law of the place of his domicile in which it is made."

This rule is also followed in *Harrison v. Nixon*, 9 Pet. 483. This rule has also been followed in most, if not all, of our sister states where the question has arisen. *Crusoe v. Butler*, 36 Miss. 150; *Caulfield v. Sullivan*, 85 N. Y. 153; *Washburn v. Van Steenwyk*, 32 Minn. 336 (20 N. W. Rep. 324); *Cone v. Hooper*, 18 Id. 531; *Guerard v. Guerard*, 73 Ga. 506.

Aside from these considerations, however, we are satisfied that it was the intention of the testator, as indicated by the terms of the will, to give to his executors the absolute power to sell and convey the Michigan lands, and this without condition or limitation; the words in paragraph 4, "at schedule prices, or as much better as may be," only being used by him as advisory to the

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executor to obtain the best possible price. This paragraph in connection with the remaining portions of the will indicates and expresses a strong desire on his part to have his estate concentrated in Kansas City. In fact, the whole plan and scheme of the will is an unmistakable desire and direction that all his properties should be converted into Kansas City properties. Courts, in construing wills, are bound to give that construction which shall carry out the intention of the testator, if such intention can be ascertained from the terms of the will. This intention being ascertained, courts will carry out its terms, so far as lawful. *Cummings v. Corey*, 58 Mich. 494 (25 N. W. Rep. 481); *Tracy v. Murray*, 49 Id. 35 (12 N. W. Rep. 900).

The true intent and meaning of the testator having thus been ascertained, so far as relates to his Michigan lands, it is now important to ascertain what effect the will has upon these lands, and how far the executor may proceed in their disposition. The direction that the exchange should be made is imperative, and, as we have seen, without condition. Equity must, therefore, consider that done which the testator lawfully directed, unless such disposition is unlawful, or, as counsel contend, affected by our statute against perpetuities, which we shall consider further on. We have no doubt that this equitable conversion was effected by the terms of the will. The matter is not left discretionary with the executor, but is imperative, and the conversion is to be made out and out, irrespective of all contingencies. This doctrine is fully settled in this State in *Shaw v. Chambers*, 48 Mich. 359 (12 N. W. Rep. 486), and cases there cited. This whole subject is so fully discussed by Mr. Justice Cassoday in *Ford v. Ford*, 70 Wis. 19 (33 N. W. Rep. 188), that we refer to that case, and the authorities

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there cited, fully settling the question as applicable to this will.

It is contended, however, by the learned counsel for the appellant, that the case of *Shaw v. Chambers* and the cases there cited, and the cases cited by the Wisconsin court, do not sustain the position that the direction contained in the will works an equitable conversion; that all of them are cases in respect to a direction for the investment of personal estate into real estate, or the investment of the proceeds of real estate converted generally, out and out, into personalty for all purposes, and not having the attribute or incidents of realty in any respect whatever. It is further contended that the direction for the conversion of real estate in Michigan into real estate in Missouri will compel the courts of Michigan, under the construction contended for by the executor, to administer the law of a foreign state, instead of the *lex rei sitæ*. In other words, that the direction in the will is for a double conversion,—first, into personalty; and then the investment of the proceeds in lands in Missouri. Double conversion does not differ, however, from single conversion, but the property is treated as if already converted into that species of property into which it is directed to be changed, no matter whether the steps are more or less numerous. The rule is laid down in 3 Pom. Eq. Jur. § 1178, that a double conversion takes place when land is directed to be sold and converted into money, and these proceeds are directed to be laid out again in land, the whole forming one continuous obligation. The property, in such cases, is considered to be in that state in which it is ultimately to be converted; that is, to be land. This rule does not, as will presently be seen, require this Court to pass upon or administer the laws of Missouri. This question will, however, be discussed under another head.

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It is evident that the will, in some of its parts, in providing for the investment of the estate in lands in Missouri, and designating the parties who are to take upon certain contingencies, and in fixing the time when such estates are to vest, would, if to be administered in this State, be in violation of our statute against perpetuities. How. Stat. § 5531, provides:

"The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section."

The next section does not affect the question in issue. The direction is that his son, Marcus, shall have one-quarter of the net annual income, until such time as he shall come into the possession of the entire estate; that his brother Edward Irving shall have one-quarter, and his brothers Joseph C. and Henry T. shall each have an eighth, of such annual income. It is further directed that Marcus shall have, when attaining his majority, $10,000 worth of real estate; when 25, an additional $20,000; when 30, an additional $25,000; and at 35, an additional $45,000 worth of real estate; and when 40 years of age, the remainder of the estate. In event that Marcus shall decease after reaching his majority leaving one or more legitimate children, the income of $40,000, or so much as is necessary, is to be set apart for their support until of legal age, and then to be paid over to them absolutely. In the event that Marcus shall survive all the other legatees, and die before coming into possession of the whole estate, the remainder is to go to Hamilton College. In the event that his wife, Maggie, or one of the brothers; shall become the only surviving legatee, the estate is to be divided into two equal parts, and the wife or brother to take one part for life, the other part

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to go to Hamilton College, to be used as directed in article 14 of the will.

It is claimed by counsel for the executor that these trusts are separable and several in their nature and character, and that the share of the estate producing the income belonging to each legatee, respectively, is only tied up in trust during two lives,—that is, during the life of Marcus and of such legatee; and that the will is to be regarded in the same light that it would have been if it had created five distinct trusts, and that they would all terminate on Marcus reaching the age of 40 years, and that therefore these trusts do not violate the rule against perpetuities. It will be observed, however, that the trust is not for the payment of a certain sum in gross. It is entirely uncertain in amount, and the executor is required to retain the estate until the right of the surviving party entitled to a definite proportion of its net income alone survives, which is beyond two lives in being at the creation of the estate.

The fact, however, that these trusts would be void under our statute, does not prevent the equitable conversion of the lands in this State into Missouri lands, though such lands in Missouri may be tied up beyond the time limited by the Michigan statutes. The direction is for a conversion of these Michigan lands,—an absolute sale and disposition of them. The object of our statute was to prevent the lands within this State from being taken out of the channels of trade and the accumulation of large landed estates to be held in perpetuity, or for a long series of years. The only act which the executor is required to perform in Michigan is to make the sale; the proceeds to be taken to Missouri, and there invested. Our statute is in no sense violated by the direction in the will that the estate, after conversion here, is to be invested in Missouri lands, and there held for any number of

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lives. The testator, in ordering his estate to be invested in Missouri lands, must be presumed to have intended to submit to the jurisdiction and laws of that state. Whether the trusts created by the will are in violation of the Missouri statute is a question for that jurisdiction, and not for us, to determine. It must be held that the executor has the absolute power to sell the Michigan lands under the fourth clause of the will. We find no error in the conclusion reached by the court below, and the decree must be affirmed, the costs to be paid out of the estate. The trustees of Hamilton College have been compelled to defend their claims under the will, and must also be allowed costs out of the estate.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred.

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LUKE BROWN v. FRANK W. GILCHRIST AND MARSHALL N. BEDFORD.

Negligence—Fellow-servants—Charge to jury—Contributory negligence.

1. A foreman intrusted with the general supervision of a coal and freight business, including the unloading of vessels laden with coal, and the employment and direction of men for that purpose, is not a fellow-servant with them, and the master is responsible for his negligence in performing such delegated duties.[1]

2. It is error for the court in a negligence case to refuse to instruct the jury that, if plaintiff's own negligence caused or contributed to the injury, he cannot recover.

[1] See *Adams v. Iron Cliffs Co.*, 78 Mich. 272; *Van Dusen v. Letellier*, Id. 493 (*b*); *Hunn v. Railroad Co.*, Id. 513; *Harrison v. Railroad Co.*, 79 Id. 409.

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Error to Alpena. (Kelley, J.) Argued January 17, 1890. Decided April 11, 1890.

Negligence case. Defendants bring error. Reversed. The facts are stated in the opinion.

Frank Emerick and *Depew & Rutherford*, for appellants.

Turnbull & Dafoe, for plaintiff.

[The points of counsel are stated in the opinion, and the authorities applicable to the questions at issue are so fully reviewed in the opinion, and in the cases cited in the foot-note to head-note 1, that their restatement from the briefs of counsel is omitted.—REPORTER.]

LONG, J. The defendants, at the time of the injury complained of, were carrying on the coal and freight business at Alpena, in this State, keeping a dock and warehouse, and receiving freight from boats engaged in domestic commerce. Their freight-house, office, and coal-dock were all on the same dock, near together, and the bins into which the coal was put were about 18 feet from the edge of the dock, and about 8 feet high. The manner in which the coal was unloaded from the vessel was that horses, a quantity of which were kept constantly on hand, were placed along the dock, and running boards laid on top, extending from the top of the bin, over the rail of the vessel, to the hatchways, and the ends of the hatchways supported by two upright pieces on each side of the hatch, through which iron pins were run, and a plank or scantling placed across the side of the hatch, resting on these pins; the planking of the runway resting on this transverse scantling, about eight feet above the hatch.

The defendants had in their employ a Mr. Reed, who was a foreman, looking after the unloading of the boats,

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and attending to the freight business of the firm generally. On June 30, 1888, the barge Westford lay at the dock, laden with coal. She had two hatchways, and two runways were placed from the bin,—one to each hatch. These were erected, under the direction of Mr. Reed, on that morning, by the laborers who were there to unload the coal. Mr. Reed pointed out to them where the horses and planking were, and they built the runways from the material so furnished, and before the plaintiff came there to work. It appears that the plank or timber resting on the iron bars was a 2x8 or 2x10 white pine, about 12 feet long, resting on the pins, which were some 8 feet apart. In order to hoist the coal from the hold of the vessel, a pulley was attached to the mast, a rope run through, to one end of which was attached a bucket, and the other end wound around a drum in the hold; the drum being revolved by an engine used for that purpose. This drum operated the two buckets; one for each hatch, and going up and down at the same time. To operate these buckets, which held about a half barrel each, a man, called a "dumper," stood on the end of the runway, over the edge of the hatch, and steadied the rope so that the bucket could not catch on the end of the planking; that is, he held the rope away far enough so that the bucket could come up safely. This coal was emptied into wheelbarrows on the runway,—two barrows being used for each runway, and a man for each barrow, who came up, with the barrows, alternately; a turn out being upon the runway for the purpose of their passing each other.

The plaintiff, on the morning of June 30, 1888, went with a Mr. Hite to the defendants' docks to get employment,—he and Hite having learned that two men were going to quit. They were accustomed to this kind of work, and had before assisted in unloading vessels. Arriv-

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ing at the dock, Hite spoke to Reed about working, who said: "All right. Go to work,"—and Hite then turned to the plaintiff, and told him it was all right, and they went to work; and Reed took the time. The plaintiff went to work on the after scaffold, wheeling coal. The plaintiff testifies as follows as how the injury occurred:

"I wheeled for some time, when they stopped to lengthen out the line, as the coal was getting lower in the hold of the boat, and we thought that was a good time to go down, and answer a call of nature. In returning the other two men happened to get on the staging before I did. One of these men was tending to the buckets coming up, so that they would not catch on the staging, and the other man was wheeling along with me, that is, he was wheeling his own barrow. I saw John Reed [the defendants' foreman] standing on the rail of the boat, and he says: 'Brown, we are waiting for you.' I says: 'All right; you won't have to wait long on me.' With that, I got upon the staging, and the other man was going to take my wheelbarrow. 'Never mind,' says I, 'I will take my own wheelbarrow. Stand aside.' With that he stood aside, and I went to catch up my own wheelbarrow. I had it up. Down went the scaffolding, and I was pitched backward in the hold. I struck right on my back, and there came part of the staging onto my leg, and broke it in two places; and my back was hurt more than my leg."

Plaintiff also gave testimony showing that he was seriously and permanently injured. He also gave testimony tending to show that this plank, resting upon the iron pins holding the running boards, broke near the center, between the pins, thus causing the fall of the plank, which precipitated his fall into the hold of the vessel, 20 feet below, and that this plank or scantling so broken was worm-eaten, and contained knots, and was wholly unfit for the purpose for which it was being used.

The claimed negligence set out in the declaration is that the defendants, not regarding their duty in this behalf, erected, and caused to be erected, said scaffold or

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platform and gangway out of rotten and unsound timbers and material, so that the same gave way, and fell while the plaintiff was working thereon. The declaration charges a duty upon the defendants to build such scaffold of strong and sound timbers and materials, and in a strong and substantial manner, so that the same would not fall while plaintiff was working thereon.

The defendants gave testimony tending to show that this timber was sound, contained no knots, and was of sufficient strength for the purposes for which it was being used, and that the accident occurred by reason of the fact that these men left their places, and on returning—two wheelbarrows being there, loaded with coal—the dumper could not reach out to guide the rope, so that the bucket caught on the end of the planking extending over the edge of the hatch, lifting them up for a distance, and that, in falling with the weight of the three men and the coal, they broke the scantling, and that this was the occasion of the injury.

Mr. Redman, who was standing near, gave his version of the casualty as follows:

"Mr. Brown went after a drink, and the bucket came up, and my nephew, he dumped Mr. Brown's bucket; and at that time the bucket went down, and they loaded her with coal again, and the other bucket came up. At that time Mr. Brown just got back there by the wheelbarrow when this bucket was swinging back and forward, and it struck this staging, the same as here, and raised it up; and it fell down, and broke it through. The bucket was swinging backward and forward, and coming up, at the same time. I suppose the dumper did not stop it because he could not get at it. It was on that side; and, Mr. Brown being here with his full wheelbarrow, he could not reach over there. Brown left his wheelbarrow standing at the end of the scaffold where it was loaded. At that time the other wheeler was just coming back with his wheelbarrow. My nephew dumped the bucket in Brown's barrow. He was the wheeler there, and the bar-

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row stood waiting Brown's return. My nephew was standing on one side, the dumper on the other, the bucket swinging back and forward. Brown got in between the handles of his barrow, when it broke down."

The captain of the barge and others gave the same version of the accident. Defendants also gave testimony tending to show that they had plenty of good material to make scaffolding from; and one of the men working upon it, and who helped build it, testified that he selected this timber that broke from a pile of lumber in defendants' mill-yard, which is just adjoining the dock, and that it was a new piece.

There seems to be no controversy but that Mr. Reed set the men to build the scaffold, and that the plaintiff was not there at the time. Neither does there seem to be much controversy as to the position which Reed occupied. Defendant Bedford testified that—

"Reed was acting in the capacity of a kind of foreman, looking after unloading boats, and attending to the freight business generally."

On the question of the defendants' providing plenty of suitable and good material of which to construct the scaffold, some considerable testimony was given, from which it appears, under the testimony of Mr. Reed, that the material for this structure was kept piled upon the dock beside the coal bins; that the defendants had about 15 dock horses, and two sets of deck horses to go on the boat, and 20 to 25 running boards, and lots of cross-pieces. And Mr. Reed testifies that he did not think the stick which broke could have been knotty or worm-eaten, "because there is lots to put in there," and that he stood there, and told the men who put this scaffold up, "if there was not enough there, there was lots in the mill-yard." Mr. Otto Redman, working on the platform, says that he helped put the scaffold up; that the stick was a

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piece of Norway; and that they picked it out for themselves to work on, and had a whole pile in the mill-yard to select from.

The contention of the defendants' counsel is—

1. That the defendants provided plenty of suitable and good materials of which to construct the scaffold.
2. That they placed the oversight and charge of building it with a competent and fit servant.
3. That the same was put up under the direct personal supervision and direction of Reed, the defendants not being present or superintending or directing in person the erection, or the selection of the materials of which it was composed.

Counsel claims from these facts it follows, as a matter of law, that defendants had discharged the full measure of their duty towards the plaintiff; that is, that when the master has furnished all necessary and proper and safe material, and a competent and fit foreman, to whom he intrusts the whole supervision of the work being carried on, he is no longer responsible, and for the negligence of the foreman he cannot be held responsible. This claim is based upon the proposition that Reed is the fellow-servant of the plaintiff, and if this is true the learned counsel is correct in his conclusions; but if Mr. Reed was a superior servant, standing in the place of the master, then the master would be held liable.

This is a question upon which the courts are not in harmony, and each case is so dependent upon its own peculiar facts that it is difficult to lay down any general rules by which all cases can be governed. Here the facts are that the defendants gave over to Reed the entire charge of selecting the materials, and putting up the scaffold, and unloading the coal; and he had authority, or at least exercised it upon that occasion, to employ the men to do the work. This of itself is strong evidence that he stood in the place of the defendants, represent-

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ing them in the work, and was not an ordinary employé. The contract of employment with the plaintiff was that he should have a safe place to work, and the law imposed upon the defendants the duty to furnish such a place. If the scaffold had been erected under the supervision and direction of one of the defendants themselves, and the casualty had occurred, as claimed by the plaintiff, by reason of the defective, worm-eaten, and knotty timber, which the defendants knew, or by reasonable care could have discovered, was dangerous in that place, then the plaintiff would have had the right to recover for such injuries, unless himself negligent. I am not prepared to say that the master, under such circumstances, can shift his responsibility by the selection of a foreman; and I do not understand that this doctrine has ever been held by this Court.

Counsel cites *Quincy Mining Co. v. Kitts*, 42 Mich. 34, as upholding that doctrine and sustaining his position. The rule is expressly laid down in that case that—

"The duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and, if it becomes necessary to instrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence."

While it is the truth that, under the circumstances of that case, it was held that the company could not be held liable, yet it is expressly stated that the Court looked in vain for any evidence appearing in the record that Wagner was negligent. Some general rules were laid down in that case, but they related to the case then in hand, which was very different from the present.

Counsel also cites *Hoar v. Merritt*, 62 Mich. 386, as sustaining the rule. But a critical examination of that

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case shows a very different state of facts than the present. There the defendant, Merritt, in building his house, furnished plenty of good materials, which were actually used in building the scaffold. He had an architect employed by the month; and competent carpenters, acting under him, built the scaffold for their own use in putting up the cornice to the building. After the cornice was completed the defendant employed Mr. Zryd to do the painting. The plaintiff was engaged by Zryd to assist in this work; and, going upon the scaffold, it gave way, and he was injured. The material furnished was good, and there was no explained reason why it fell. It was not, therefore, questioned that the carpenters who built the scaffold were competent, and that they selected good materials. Neither did they build it for the use of the painters. Another important feature existing in the present case did not appear in that. Here Mr. Reed not only had the full charge of the men, but employed them, and directed their work. They were not shown to be carpenters, or in any way qualified to select good material, or competent to erect a proper and safe scaffold; and, if the testimony of the plaintiff and his witnesses is true, they erected a very unsafe one, and from material not fit for that purpose, and which they placed where the most danger should have been apprehended, upon the edge of the hatch, and over a hole 20 feet in depth. The power and authority given to Mr. Reed far exceeded the authority given Gregory in *Hoar v. Merritt, supra.* Counsel, in his brief, even uses the argument that, because Reed had such absolute control and direction in and about the business there, the defendants could not be held responsible. He says:

"And there is absolutely no ground on this record for any claim that either of the defendants was present or superintending or directing in person the erection of this

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scaffold, or the selection of the materials of which it was composed."

That is, because the defendants had delegated the authority to Mr. Reed to select proper materials, and to direct, control, and superintend the erection, they should escape liability. If this were the rule, then the more they remained away from their business,—the greater power and authority they gave a foreman or manager to select material, employ men to build a safe and proper scaffold, upon which other servants, who had no knowledge of the manner of its construction, were to be invited to work,—the less the liability. It is the duty of the master to furnish the servant a safe place to work upon, and he cannot shift this responsibility by saying:

"The foreman whom I employed was selected with care, and for his fitness for the work entrusted to him. I pointed out to him all necessary and proper material; and, therefore, though he did not make a proper selection of material, and did not build a safe structure, my hands are clean, and no responsibility rests with me. I have discharged the full measure of my duty to the men whom he guides and controls."

Especially is this true if it appears, as in this case, that he has entrusted the entire management and control of that business in the hands of such foreman, with power to employ the men, and he himself retires from any direction and control over it. Mr. Reed apparently had this authority; and, from the manner of the accident claimed by the plaintiff, it is evident that the men selected by Mr. Reed to find the timber to support these running boards were wholly unfit to build such a scaffold. It was Reed's duty to examine this scaffold, and see that it was properly built, before sending the plaintiff there to work; and, under the authority delegated to him by the defendants, and the control he assumed of affairs

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there, he stands in their place, and they must assume the risks of his negligence. Upon this branch of the case the instructions given by the circuit judge were proper.

The court was in error in refusing the defendants' seventh request to charge, as follows:

"If plaintiff's own negligence caused or contributed to the injury, he cannot recover."

The court should have directed the attention of the jury to the claim made by the defendants' counsel as to the negligence of plaintiff. The theory of the defendants was that the plaintiff, and the others with whom he was working upon the runway, went away, and left the wheelbarrows there in such a position that the dumper could not properly control the rope,—thus permitting the bucket to catch the end of the scaffold, and raising it; and, when loosened, it dropped back upon the cross-piece, which, with the added weight of the coal and both barrows, and the three men, caused the breaking. If the breaking of the cross-piece was caused in this manner, and resulted from the negligence of the plaintiff or the men immediately employed with him, or by their negligence in this regard they contributed to the injury, the plaintiff could not recover, and the jury should have been so instructed. It was probably an oversight in the trial judge in refusing this request, as the rule is undoubtedly well understood by the learned circuit judge that in all actions for injuries caused by the alleged negligence of another the plaintiff himself must be free from fault, to sustain his action.

The judgment must be reversed, with costs, and a new trial ordered.

CHAMPLIN, C. J., and MORSE, J., concurred with LONG, J.

GRANT, J. I concur in the result.

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THE WISCONSIN FIRE & MARINE INSURANCE COMPANY BANK v. E. GORDON FILER, ASSIGNEE, AND THE MANISTEE SALT & LUMBER COMPANY. (IN THE MATTER OF THE PETITION OF CHARLES L. ORTMANN.)

Contract for sale of timber—Bill of sale—Reservation.

A land-owner contracted for the sale of timber on certain lands which he had conveyed, in trust to secure a creditor, giving the vendee three years in which to remove it, and retaining the title until the purchase price was paid, the payment of which was further secured by the vendee's note. The vendor soon after accepted the indorsed note of an assignee of the contract in payment of said note, and deposited the *substituted* paper with the creditor, who still held the legal title to the lands. The indorser, having secured an assignment of the timber contract, and being desirous of cutting the timber and of securing an extension of the time for its removal, took up the indorsed note with new paper, which was left with the creditor, who reconveyed the lands on which the timber stood to the vendor, who thereupon executed a bill of sale to the second assignee, which was declared to be given in fulfillment of the timber contract, and contained a covenant of warranty, except as to the conditions and provisions of the original contract, and the vendor, by a separate agreement, extended the time for removal for one year. And it is held that the bill of sale conveyed the *absolute* title to the timber to the vendee therein named, and that if it was the intention of the vendor by the exception to retain the title to the timber, as provided in the original contract, such exception was repugnant to the grant, and void.

Appeal from Manistee. (Judkins, J.) Argued January 17, 1890. Decided April 11, 1890.

Petition for payment of claim against an insolvent estate. Petitioner appeals. Decree affirmed. The facts are stated in the opinion.

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McAlvay & Grant, for appellant.

Uhl & Crane and *Ramsdell & Benedict,* for defendants.

CHAMPLIN, C. J. The petitioner presents a claim against the receivers of an insolvent estate, praying that he may be paid the full balance remaining due of the purchase price of certain pine and ash timber which he claims to have sold by contract, retaining title in himself until the purchase price should be paid, the avails of which timber he claims is in the hands of the receivers. The important question is whether he has parted with his title to the timber. A history of the transactions, stated as briefly as possible, is necessary to a proper understanding of the question raised.

On January 2, 1886, Charles L. Ortmann was the owner of large tracts of land in Michigan, and among them the lands upon which the timber in question was standing. On that day, being indebted to the bank of which Mr. Edward H. Butler was president, and desiring to secure the bank, he conveyed the tracts of land by warranty deed to Mr. Butler, who held them in trust and as security for the bank.

On December 7, 1886, Ortmann entered into a written contract with Eugene Chappell and D. J. Smith, in which he agreed to sell to them all the pine and ash timber then growing, standing, and lying upon certain described lands in township 20 N., range 11 W., for $14,000. Four thousand six hundred and sixty-seven dollars was to be paid down, and the balance, $9,333, in accordance with a promissory note, with interest at 7 per cent., 18 months from date. It was mutually agreed that the title to the timber should remain in Ortmann, and should not pass to Chappell and Smith until the note, and interest

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thereon, should be fully paid and satisfied, and that upon such payment the title of the timber should pass to Chappell and Smith. It was stipulated that Chappell and Smith should have three years from January 1, 1887, to cut and remove the timber, and that after January 1, 1890, all the pine and ash timber then left on the land should revert to Ortmann, and they should have no right to cut and remove timber after that date. They also agreed to pay the taxes after the year 1886.

Such were the main features of the contract, so far as affects the question in dispute. It will be seen that there was an implied permission to enter upon the lands and cut and remove pine and ash timber at once, but the title to the timber so cut remained in Ortmann until the note should be fully paid, when the title was to pass to the purchasers. The rights of the parties were not very definitely fixed or guarded. There was no restriction against cutting more than a certain quantity, without paying in proportion as such cutting would lessen the security; and the title of Ortmann would be of little security after the lumber had lost its identity by being thrown upon the market, and mingled with other timber of like grades.

In August, 1887, R. A. Seymour negotiated with the purchasers under the contract, and by a memorandum of agreement dated August 19, 1887. Ortmann made an agreement with Seymour, in which it was recited that Ortmann did, on December 7, 1886, sell to Chappell and Smith all the pine and ash timber on the lands described in that contract, and that the note of $9,333, maturing June 7, 1888, given by them, was unpaid, and reciting that Chappell and Smith had sold to Seymour said pine and ash timber, and he had assumed the payment of the note, with interest; and therefore agreeing to accept payment from Seymour of the note and interest, in a note made by

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Seymour payable to the order of M. Engelmann, and indorsed by him to Ortmann, payable on or before June 7, 1888, and payment of the interest from December 7, 1886, to the date of the agreement. On the delivery of the new note of Seymour, and payment of interest, Ortmann was to cancel and give up the Chappell and Smith note; and it was further recited that Butler held the Chappell and Smith note, as well as the title to the land, as collateral security, and had agreed to reconvey the land upon payment of $7,000, and to accept the Seymour note, indorsed by Engelmann, in the place of the Chappell and Smith note, which was to be delivered up and canceled; and it was therefore agreed that the Chappell and Smith contract should stand, and be in full force and effect in all its provisions and covenants, until the aforesaid note of said Seymour and Engelmann, with interest thereon, should be fully paid and satisfied, and the agreement was made a part of the contract. This contract was, on September 14, 1887, assigned by Seymour to Engelmann. On September 22 a formal assignment of the contract of December 7, 1886, was made by Chappell and Smith, and others who had become interested with them, to Seymour; and on September 24, 1887, Seymour assigned his interest in the contract to Engelmann.

It is proper now to call attention to certain correspondence appearing in the record. The first letter is dated September 10, 1887, and is written from Detroit by Mr. Ortmann to Mr. Seymour at Manistee. This letter refers to the exchange of the Seymour-Engelmann note for the Chappell and Smith note, then in the hands of Mr. Butler. The next letter bears the same date, and is written by Ortmann at Detroit to Engelmann at Manistee. In this he says that he forwarded to R. A. Seymour the contract for timber purchased by him from Chappell and Smith, refers to Seymour's doubts relative to the title,

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and explains the situation of the title fully to Mr. Engelmann. On September 13, 1887, Mr. Engelmann writes to Mr. Ortmann, acknowledging the receipt of his favor of the 10th, and informs him that he has bought the timber of Mr. Seymour, and that he looks to him for the title. He then proceeds:

"But will say, according to your letter, it seems you only owe $7,000 to Mr. Butler, and, if you wish, I will do this,—namely, I will arrange with you for the $2,333, if Mr. Butler is satisfied, and pay the balance on or before June 1, providing I can cut the timber. If this helps you, let me know, and will do what I can for you."

On September 14, 1887, Mr. Ortmann replies as follows:

"HON. M. ENGELMANN,
"Manistee, Mich.

"*Dear Sir:* Your kind favor of the 13th inst. rec'd; contents duly noted. In reply will say that after consulting Mr. Butler I came to the following conclusion: If you will give me R. A. Seymour's notes, indorsed by yourself, running with interest 7 per cent. P. An. from August 19 (the date you bought the timber from Chappell and Smith), maturing January 15, next, for $2,333, and maturing on or before June 1, next, $7,000, I shall execute bill of sale in accordance with my contract with Chappell and Smith at once to you without further security; and, as Mr. Butler consented, as I said, will put his deed to me for the land upon the county of Lake record at once. Please remit these notes to Mr. Butler direct, and I will attend to the balance, if satisfactory to yourself and agreeable to Mr. Seymour. Thanking you for your prompt reply, I remain,

"Yours very truly,
"CHAS. L. ORTMANN."

Upon the margin below appears the following:

"DETROIT, Sept. 14, 1887.
"I am willing to accept the within described notes in place of the security I now hold.
"E. H. BUTLER."

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On October 1, 1887, Mr. Ortmann wrote to Mr. Engelmann as follows:

"DETROIT, MICH., Oct. 1, 1887.

"M. ENGELMANN, ESQ.,

"Manistee, Mich.

"*Dear Sir:* Your favor of 27th ult. came duly to hand. In accordance with your request, I inclose you herewith bill of sale of the pine and ash timber, on lands in T. 20 N., R. 11 W.; also my agreement to extend the period of cutting and removing the said timber therefrom to January 1, 1891. Please to notify me by mail of your acceptance of the bill of sale and the agreement for cutting timber, with conditions and provisions therein mentioned; also, if these papers are satisfactory, please forward to me the assigned contract which you hold from Chappell and Smith. I have this day forwarded for record deed from E. H. Butler and wife to me for the lands in T. 20 N., R. 11 W. Your notes dated August 19, 1887,—one for $2,333, due January 15, 1888, and one for $7,000, due June 1, 1888,—were received by Mr. Butler all right.

"Very respectfully yours,

"CHAS. L. ORTMANN."

Mr. Butler also wrote to Mr. Engelmann on October 1, 1887, saying:

"I have quitclaimed the land to Mr. Ortmann. He forwards the deed for record; also sends you bill of sale of the timber and agreement to extend time for cutting. I inclose herewith the note of R. A. Seymour, $9,333, indorsed by you.

"Resp'y, E. H. BUTLER."

The inclosures referred to in the letter of Mr. Ortmann to Mr. Engelmann were as follows:

BILL OF SALE.

"*Know all men by these presents,* That I, Chas. L. Ortmann, of the city of Detroit, in the county of Wayne and State of Michigan, of the first part, for and in consideration of the sum of fourteen thousand ($14,000) dollars, lawful money of the United States, to me paid by M. Engelmann, of Manistee, Manistee county, Michigan,

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of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all the pine and ash timber growing, standing, and lying upon those certain pieces or parcels of land situate in the county of Lake and State of Michigan, and described as follows, to wit: In township twenty (20) north, of range eleven (11) west, the east half of north-east quarter (E. ½ of N. E. ¼), the north-west quarter of north-east quarter (N. W. ¼ of N. E. ¼), the north-east quarter of north-west quarter (N. E. ¼ of N. W. ¼), the south-east quarter of south-west quarter (S. E. ¼ of S. W. ¼), the south-west quarter of south-east quarter (S. W. ¼ of S. E. ¼), and the east half of south-east quarter (E. ½ of S. E. ¼), of section sixteen (16), and the south-west quarter of north-east quarter (S. W. ¼ of N. E. ¼), of section twenty-eight (28).

"This instrument is given in fulfillment of a certain contract, made and executed by the aforesaid Charles L. Ortmann, of date December 7, 1886, agreeing to convey the aforesaid timber to Eugene Chappell, of East Saginaw, Mich., and D. J. Smith, of Saginaw City, Mich., which said contract has been duly assigned by said Chappell and Smith to one R. A. Seymour, and by said Seymour to the aforesaid M. Engelmann, to have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever.

"And the said party of the first part, for himself, his heirs, executors, and administrators, does covenant and agree to and with the said party of the second part, his executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made, unto the said party of the second part, his executors, administrators, and assigns, against all and every person or persons whatsoever, *except as to the conditions and provisions of the aforesaid contract.*

"In witness whereof, I have hereunto set my hand and seal this thirtieth day of September, one thousand eight hundred and eighty-seven.

"CHAS. L. ORTMANN. [L. S.]

"Signed, sealed, and delivered in presence of

"ROSWELL HARRIS.

"ALFRED M. LOUD."

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AGREEMENT FOR CUTTING TIMBER.

"DETROIT, MICH., Sept. 30, 1887.

"I do hereby agree with M. Engelmann, of Manistee, Mich., as follows, to wit:

"That, whereas, I did, on the 7th day of December, A. D. 1886, make an agreement with Eugene Chappell, of East Saginaw, Mich., and D. J. Smith, of Saginaw City, Mich., to sell to them all the pine and ash timber from certain lands in T. 20 N., R. 11 W., which said contract was assigned by said Chappell and Smith to one R. A. Seymour, and by said Seymour to the aforesaid M. Engelmann; and, whereas, the time for cutting and removing said timber was limited in said contract to three years from January 1, 1887, that is to say, to January 1, 1890; and, whereas, said Engelmann has requested that the period for cutting and removing said timber be extended for one year longer, to wit, to January 1, 1891:

"Now, therefore, if said Engelmann shall well and truly pay, in due season, all the taxes levied or assessed upon the lands mentioned in said contract with said Chappell and Smith, for the additional year hereby granted, that is to say, for the year 1890, and in consideration of such payment of taxes, and not otherwise, I do hereby agree to extend to said Engelmann the period for cutting and removing said timber for one year longer; that is to say, to the first day of January, A. D. 1891.

"CHAS. L. ORTMANN."

In making out the above bill of sale Mr. Ortmann used an ordinary blank form, but the sentence appearing in italics was interlined with ink. I mention this because it was regarded as important by petitioner's counsel upon the argument. The oral testimony introduced to vary or explain the written evidence, or to show the intention of the parties, is excluded from our consideration as being incompetent. We think there is enough upon the face of the papers, taken in connection with the correspondence, to dispose of the question without resort to oral testimony.

At the time the bill of sale was executed, Engelmann owned all of the interest in the pine and ash timber

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which Ortmann had conveyed by his contract to Chappell and Smith, and Ortmann had been informed that he was such owner. He held Seymour's note, indorsed by Engelmann, for $9,333, payable on or before June 7, 1888, which he had placed with Butler as collateral security. There was nothing in the contract which prevented Engelmann from cutting timber, but, if he did cut, the title to the severed timber would remain in Ortmann, and he would only be adding value to Ortmann's property by so doing, without any right to dispose of the same unless Ortmann consented to the sale. The contract effectually hampered any operations looking towards the conversion of the timber into money. It prevented the sale of the timber by Engelmann. He could make full payment at any time, and thus become invested with the legal title; but nothing short of full payment would do so

Ortmann had written Engelmann, explaining his situation, and of the title; that he had owed the bank $15,000, and had placed the title of the land and the note for $9,333, which he had received from Chappell and Smith, and later the substituted note of Seymour, indorsed by Engelmann, in Butler's hand as security; that he had reduced the indebtedness to $7,000. Upon this information Engelmann offered to pay him the balance over the $7,000, namely, $2,333, and pay the balance on or before June 1, 1888, providing he could cut the timber. The meaning of this expression, "providing I can cut the timber," was perfectly clear to Mr. Ortmann. Both parties knew it did not refer to what Engelmann had a right to do then under the contract. Mr. Ortmann understood that Engelmann referred to a transfer of the title, so as to make the cutting of the timber of value to him. Consequently, on receipt of this proposition, he wrote the letter of September 14, 1887, in which he makes the proposition that if Engelmann will give him the notes specified he

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will execute a bill of sale in accordance with his contract with Chappell and Smith *at once*, to Engelmann, *without further security*, and Butler would reconvey the land to him. The object of all this was to convey the title of the timber to Engelmann. To carry out this purpose, Butler reconveyed the land, by deed dated September 30, 1887, to Ortmann, and he on the same day, by bill of sale, conveyed the title of the timber to Engelmann. If the bill of sale was not executed to convey the absolute title to the timber to Engelmann, it was without point or purpose,—a mere idle ceremony.

It is claimed by petitioner's counsel that the words in italics in the bill of sale, namely, "except as to the conditions and provisions of the aforesaid contract," make the bill of sale subject to all of the provisions of the contract, including that which says the title to the timber shall not pass to the purchasers until full payment. I do not agree with him. The exception, whatever it may mean, is in the warranty clause, and not in the granting clause, of the contract. The bill of sale is absolute in terms, and acknowledges the receipt of the full contract price as a consideration. It further states that it is given in fulfillment of the contract of December 7, 1886, *agreeing to convey* the aforesaid timber to Chappell and Smith; and in it Ortmann agrees to warrant and defend the sale of the property thereby to Engelmann against all persons whatsoever. If it was the intention, by the exception which then follows, to retain in Ortmann the title to the timber which, by the same instrument, he conveyed, the exception would be repugnant to the grant, and void. It cannot be constructed to have the effect to nullify the sale of the timber, and of the vesting of the title in Engelmann.

When the bill of sale was executed and delivered to Engelmann, the only provisions of the contract remaining

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in force were those providing that the timber not taken off within the time limited should revert and belong to Ortmann, which time was extended to 1891, and the fifth and sixth clauses, not necessary to mention here. The bill of sale was not obtained by fraud, and it is a valid instrument. By it Ortmann voluntarily parted with his title to the timber, and has no lien or claim either upon the timber or upon the proceeds or avails thereof.

The decree appealed from is affirmed, with costs.

MORSE, LONG, and GRANT, JJ., concurred.

ROBBINS B. TAYLOR ET AL. v. THE BAY CITY STREET RAILWAY COMPANY.

Equity practice—Parties—Street railways—Condemnation proceedings—City charter.

1. The owners of separate lots abutting on a street may join in a bill to restrain the construction of a street railway therein without complying with a statute requiring the payment to such owners of the damages thereby sustained, which damages are not recoverable in such suit, but in the condemnation proceedings provided for by the statute.[1]
2. It is clearly within the power of the Legislature to provide that street railway corporations shall pay to owners of abutting property, in front of which they construct their roads, the damages caused by such construction.
3. A street railway company, which receives its franchise from a village whose charter does not expressly confer upon the municipality power to authorize the use of its streets for street railway purposes without compensating adjoining owners, and which power is neither necessary, essential, nor indispensable to enable the municipality to carry out the objects and pur-

[1] See *Turner v. Hart*, 71 Mich. 129 (head-note 5), as to joinder of complainants.

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poses for which it was created, accepts such franchise subject to the right of the Legislature to prescribe such compensation as a condition precedent to the use of such streets for the construction of *new* lines of road.

Appeal from Bay. (Cobb, J.) Argued January 17, 1890. Decided April 11, 1890.

Bill to restrain the construction of a street railway. Complainants appeal. Decree reversed, and one entered restraining the use of a portion of defendant's road until it complies with the statute requiring condemnation proceedings, etc. The facts are stated in the opinion.

T. A. E. Weadock, for complainants, contended for the doctrine stated in the opinion.

Hatch & Cooley, for defendant, contended:

1. It is competent for the Legislature to authorize the construction of a street railway, where the cars are drawn by horses and the rails are laid at the grade of the street, so that the ordinary travel is not materially interfered with, without requiring compensation to be made to the adjoining property-holders; citing *Railroad Co. v. Heisel*, 38 Mich. 66; *Railroad Co. v. Railroad Co.*, 33 Barb. 420; *Railroad Co. v. Railroad Co.*, 35 Id. 368; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Railroad Co.*, 50 Id. 206; *Story v. Railroad Co.*, 90 Id. 122; *Mahady v. Railroad Co.*, 91 Id. 148; *Elliott v. Railroad Co.*, 32 Conn. 579; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Attorney General v. Railroad Co.*, 125 Mass. 515; *Hobart v. Railroad Co.*, 27 Wis. 194; *Railroad Co. v. O'Daily*, 12 Ind. 551; Cooley, Const. Lim. 552 *et seq.*; *Milburn v. Cedar Rapids*, 12 Iowa 246; *Clinton v. Railroad Co.*, 24 Id. 455; *Franz v. Railroad Co.*, 55 Id. 107; Pierce, Railroads, 180, and cases cited; 2 Dill. Mun. Corp. §§ 722–727.
2. The constitutional provision which forbids the taking of private property without compensation is inapplicable, for the reasons—
   a—Private property is not taken.
   b—No added servitude is imposed upon the street outside of and beyond the original purpose of dedication.
   The doctrine of this proposition falls within the authorities above cited. The constitutional right to such compensation does not extend to injuries where the land is not actually taken, but only indirectly or consequentially injured; citing

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Railroad Co. v. Larson, 40 Kan. 301; *Radcliff v. Mayor*, 4 N. Y. 195; *Conklin v. Railroad Co.*, 102 Id. 107; *Railroad Co. v. Applegate*, 8 Dana, 289; *Transportation Co. v. Chicago*, 99 U. S. 635; *Railroad Co. v. Joliet*, 79 Ill. 35.

3. The train-railway act does not require payment of damages for locating a train railway upon a street; citing Comp. Laws 1857, p. 679; and said act expressly authorized the action taken by the common council of the village of Bay City in passing the ordinance of December 14, 1864, under which the defendant acquired the right to construct its road in any of the streets of the village during the life of the ordinance without making compensation to the abutting lot-owners, which right could not be impaired by subsequent legislation; citing the *Dartmouth College Case*, and cases which have collected around it.

4. If such right has ever been waived or lost, it must be by reason of the acceptance by the defendant of the ordinance of 1885, and upon the theory that, the latter ordinance having been passed under the amended charter of the city, requiring such compensation, such requirement is embodied therein. The ordinance of 1885 re-enacts, but does not repeal, that right, and the acceptance of the defendant is no broader than the ordinance, and by such acceptance the defendant did not accept a right which it then had.

GRANT, J. The defendant was organized February 21, 1865, under an act of the Legislature providing for the organization of train-railway companies, enacted in 1855. How. Stat. chap. 94. This act was amended in 1861 by adding two new sections. Laws of 1861, p. 11. This amendment provided that it should be competent for parties to organize companies under the act to construct and operate railways in and through the streets of any town or city in the State, and that they should have the exclusive right to use the same, upon obtaining the consent of the municipal authorities of such town or city. A further amendment, in 1867, provided that, after such consent was given and accepted, such municipal authorities should make no regulations or conditions whereby the rights or franchises so granted should be destroyed, or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and

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operating such railway in the street in such consent or grant named, pursuant to the terms thereof.

Bay City was incorporated by special act of the Legislature in 1865, taking effect March 21. Laws of 1865, p. 735. The charter provided that the common council should have power to grant charters, licenses, and privileges to companies, corporations, or persons for the construction of street railways on the streets of said city. In 1869 the charter of Bay City was amended. 2 Laws of 1869, p. 561. Section 98 of this act provided that the common council should have power to authorize the running of railroads and street railways in the streets of said city upon condition that the owners of the lots adjoining, and persons interested therein, should receive compensation therefor. This act also conferred other powers of control over such railways which were not conferred by the act of 1865, but it is unnecessary here to specify them. This provision has been retained in the charter ever since.

December 14, 1864, the common council of the village of Bay City passed an ordinance conveying to certain persons therein named, who then proposed to organize a corporation under the train-railway act, above mentioned, the right to use all the streets in the village of Bay City or its successor, exclusive of every other person or corporation, for the purpose of constructing and operating railways thereon. It provided that cars should be drawn by animals or by steam, made regulations for the running of trains, etc., and provided that the common council, when deeming it for the interest of the village or its successor, might order the construction of a railway on any street, and the corporation should build the same within two years after being notified, and in default thereof the council might declare the grant void as to such street.

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The defendant organized, as above stated, in February, 1865, and during that season laid tracks, and commenced the operation of its road, extending the same from time to time as the common council, and the requirements of the public, demanded. July 5, 1887, the common council adopted resolutions requiring the defendant to construct a line of railway on Third street, and some other streets mentioned. On June 18, 1888, the common council appointed a committee to draft certain amendments to the street railway ordinance. They had a consultation with the proper officers of the defendant, and on June 25 made a written report stating that the defendant proposed to build a track on Third street, between Water street and Washington street, and recommended that the proposition of the company be accepted. The report was adopted, and thereupon the defendant immediately commenced the work of laying the track.

The complainants are the owners of separate lots on Third street, and the buildings situated thereon, used for business purposes. Upon the commencement of the work the complainants united, and filed the bill in this case, claiming that the construction of the road would be a damage to their property; that this street was not wide enough for the business then being done upon it; that no compensation had been paid or offered to any of the complainants, nor any steps taken to condemn a right of way through said street,—and prayed for an injunction to restrain the construction of the road. A preliminary injunction was granted by the court below, which was set aside upon the filing of the answer. The case was then heard upon pleadings and proofs, the bill dismissed, and complainants appealed. The testimony upon the question of damages is very conflicting. It is unnecessary to discuss it here; for, if the complainants are

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entitled to recover damages, they must be left to proceedings under the statute to determine what damages, if any, they have individually sustained by the construction of the road.

1. Complainants were alike affected by the construction of this road. They were alike interested to restrain its construction. Their interests were therefore common. There was but one object to be accomplished, and no necessity existed for a multiplicity of suits. The defendant was not prejudiced by the joinder of complainants. We see no objection to parties joining in a suit, the sole purpose of which is to obtain an injunction to restrain the commission of an act threatened by one party, and alike injurious to the interests of all.

2. The defendant contends that, by the ordinance of 1864, and the legislation authorizing it, it acquired the fixed and vested right, for a period of 30 years, to use the streets for the purpose of constructing and using a street railway, without compensating adjoining owners, and that any subsequent legislation requiring it to compensate in damages for any injuries sustained thereafter by the construction of new tracks is void as impairing the obligation of contracts. It becomes, therefore, important to determine the power conferred by the Legislature upon the common council of Bay City. The council can, of course, confer no greater right upon the defendant than is authorized by its charter.

Municipal corporations derive their sole source of power from legislative enactments. The rule has been long and unquestionably established that municipal corporations are limited to those powers which are granted—

1. In express words.
2. Necessarily incident to the powers expressly granted.
3. Those which are essential and indispensable to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. § 89.

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By the village charter, the common council was authorized to lay out and establish, vacate, open, make, and alter such streets as they might deem necessary for the public convenience. No mention is made in the act of train or street railways. The act incorporating the city provided that all the acts and ordinances of the common council of the village of Bay City not inconsistent with the laws of this State shall remain in full force until changed by the common council of the city; and the same section gives the power to grant charters to street railway corporations. These charters do not in express terms confer upon the council any such power as is now contended for. If it exists at all, therefore, it must be by implication.

The power to grant immunity to such corporations from legislative regulation and control is an important one. A village of a few hundred inhabitants may in much less than 30 years grow to a city of many thousands. Bay City well illustrates this fact. What in the one would cause no damage might in the other cause great damage. The village council cannot well provide regulations and ordinances applicable to a large city. It is, therefore, highly important that the Legislature should retain the power to pass enactments for the control of these *quasi* public corporations suitable to the changed state of affairs. Those who claim immunity from such control must be able to point to the clear enactment of the statute establishing it. In the case at bar, as already stated, no such express power can be pointed out; and it was neither necessary, essential, nor indispensable to enable the municipal corporation to carry out the objects and purposes for which it was created. It is clearly within the power of the Legislature to provide that street railway corporations shall pay such damages to owners of abutting property, in front of which they construct their

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road, as this construction will cause. It follows, therefore, that the defendant accepted its charter subject to the right of the Legislature to prescribe conditions under which it might thereafter obtain the use of the streets of the city for the construction of new lines. The act of 1869, above mentioned, expressly limited the power of the council to authorize the running of street railways in the streets of the city upon the condition of compensation to owners of the lots adjoining. The act of the Legislature of 1881, revising the charter of Bay City, provided that the method of arriving at the compensation to be paid to the lot-owners shall be the same as provided by the general railroad laws of the State. The defendant was subject to the above provisions in making the extension of its road now in dispute.

The conclusion above reached renders it unnecessary to determine the other questions raised in the case, and we pass no opinion upon the liability of the defendant at the common law. The decree must be reversed, with the costs of both courts, and decree entered here restraining the defendant from the use of that part of its road extending on Third street between Water and Washington streets, until it has complied with the statute requiring condemnation proceedings, but giving a reasonable time for that purpose.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred.

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CHARLES C. PAGE v. NICHOLAS KRESS AND ARRENA KRESS.

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Mortgage foreclosure—Resale of premises.

1. A resale will not be ordered in a foreclosure case upon an offer of increased price alone, when the property has not been sold at a sacrifice.

   So *held*, where the only reason for ordering such a resale was that a person present at the sale was willing to pay $110 more than was offered at such sale, and the consequent benefit to the mortgagor, who was entitled to the surplus.

2. The following general propositions are summarized from the opinion of Chief Justice CHAMPLIN:

   a—The practice of the English court of chancery, which is to open biddings before confirmation when an offer is made of an advance of 10 per cent. on the bid, and an indemnity to the purchaser, has not been adopted in this State.

   b—When property is exposed for sale under a judicial decree, and offered to the highest bidder, and the sale is without fraud, and is fairly conducted, after proper notice, and the property is struck off to a third person, it will require a strong case, and some peculiar exigency, to warrant a court in setting it aside.

   c—If an interested party is not barred by laches, a resale will be ordered where there has been fraud or misconduct in the purchaser; fraudulent neglect or misconduct on the part of other persons connected with the sale; or surprise or misapprehension, not attributable to the party's own fault, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducted such sale.

Appeal from Jackson. (Peck, J.) Argued January 21, 1890. Decided April 11, 1890.

Foreclosure case. Appeal from order setting aside a sale, and ordering a resale of the mortgaged premises. Order vacated, as also all subsequent proceedings thereunder. The facts are stated in the opinion.

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J. C. & C. B. Wood, for complainant.

Dwight D. Root, for defendants.

CHAMPLIN, C. J. At a sale, made pursuant to a decree of foreclosure of a mortgage, held on March 5, 1888, there were two bidders. One was William Stimer, bidding in his own behalf; and the other was C. B. Wood, who was bidding in behalf of Catherine Vedder. Wood bid $885, and afterwards Stimer bid $890; and the premises were struck off to him and his brother, Wyman Stimer, and the commissioner's deed was duly executed to them.

Several by-standers have made affidavit that, when Wood bid $885, Stimer said: "That is enough; you can have it,"—and that the commissioner then said: "Sold." But Mr. Wood, in his affidavit, does not say that the commissioner announced it as sold, but inquired for whom he was bidding, and made a memorandum of it. The commissioner makes affidavit that he did not strike off the premises to Wood, but says he made a memorandum of his bid; that Wood immediately left and went back into the court-room. It appears that he was in attendance upon the court, and had obtained leave of absence for a few minutes to attend this sale. The commissioner says that Wood and Harry Allen, who was also present at the sale, appeared to be acting in concert, and, before he announced the biddings closed, he inquired of Allen if he represented Wood, as, if he did not, he wished to send for Wood; that he understood Allen to say that he represented Wood, and that he would not raise Stimer's bid, which had been made after Wood left, of $890,—and he therefore struck off the premises to Stimer. Allen denies stating that he represented Wood, and states that he told the commissioner that he did not represent him; but he has made another affidavit in

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which he states that he was then and there ready to pay the money on Wood's bid, which shows that he had some relation to the real bidder.

There was nothing which occurred at the sale which would induce a court of equity to set it aside. The premises were finally struck off to Stimer as the highest bidder. More than this, the Wood who made the bid was one of the members of the firm of J. C. & C. B. Wood, who were the solicitors for complainant, and who, on the next day after the sale to Stimer, entered the usual order *nisi* to confirm the sale. This order was entered on March 6, 1888.

On March 13, Catherine Vedder filed a petition to set aside the sale, and for a resale, saying that she would have bidden $100 or $200 more if the premises had not been struck off in the absence of Mr. Wood. It must be remembered that in the meantime, and on the day of sale, Stimer had paid to the commissioner the amount of his bid, and it had been disbursed in accordance with the decree. To enable him to pay the purchase money, he had mortgaged the premises purchased by him at the sale, for $500, to one Powers, and had raised the balance by mortgage or sale of his personal property. The petition of Catherine Vedder was supported by several affidavits, before referred to, with reference to what took place at the sale.

It appears that the court, on July 2, 1888, made an order that the sale on March 5, 1888, be set aside on condition that the petitioner make due service of the petition on all parties interested who had not appeared, and upon petitioner's filing a bond, with sufficient surety, that there would be bid upon the premises a sum of money not less than $1,050 at any resale the commissioner might thereafter make,—said bond also to indemnify John

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Powers, mortgagee of said premises, against any damage he might sustain, and also indemnify the purchaser at the sale before then made against any damage he might sustain; and upon the filing and approval of the bond the commissioner was ordered to immediately thereafter make a resale of the premises.

Nicholas Kress petitioned the court to modify the order so as to permit a resale if a bid was offered of $1,000, representing that he could find no one to enter into a bond conditioned to bid $1,050, but that Harry Allen had promised to enter into a bond with him conditioned to bid $1,000; and he annexed the affidavit of Harry Allen to that effect. The court modified the order; and thereupon the bond was filed, and a resale had, and the premises were struck off to Harry Allen for $1,000. Afterwards, on a showing that the parties interested had not been notified, this sale was set aside, and notices ordered to be served, when another order, upon hearing, was had, and a resale ordered, and the premises, on such resale, were struck off again to Harry Allen for $1,000; he being the only bidder at both resales. This is the same Harry Allen who was present at the first sale, and who had the money with which to pay Wood's bid, and who refused to raise Stimer's bid, at that sale.

No sufficient reason is shown why the sale made on the 5th of March, which was fair and open, should be set aside to enable Mr. Allen, who was present at that sale, to raise the bid to $1,000. The only showing as to value is the affidavits of Stimer and Fisk, which show that the fair value of the premises does not exceed $900. It cannot be urged that the price at which it was sold to Stimer was inadequate, or that it was sold at a sacrifice.

A resale will not be ordered upon an offer of increase of price alone, when the property has not been sold at a

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sacrifice. The practice of the English court of chancery, which is to open biddings before confirmation when an offer is made of an advance of 10 per cent. on the bid, and an indemnity to the purchaser, has not been adopted in this State. Special circumstances, appealing to equitable considerations, must always exist, where the sale is not void, to justify an order for a resale. Where a party interested has not been barred by laches, a resale will be ordered where there has been fraud or misconduct in the purchaser; fraudulent negligence or misconduct in other persons connected with the sale; surprise or misapprehension, not attributable to the party's own fault, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale. None of these elements exist in this case. The only reason for ordering a resale is that Allen was willing to pay $110 more than was offered at a public sale at which Allen was present, and the consequential benefit to the mortgagor, who is entitled to the surplus. If this is a sufficient reason, a resale may be ordered in nearly every case of a judicial sale, the direct tendency of which would be to destroy the confidence of bidders at such sales, and prevent bidding; thus affecting the price at which the property will sell for. When property is exposed for sale under a judicial decree, and offered to the highest bidder, and the sale is without fraud, and is fairly conducted, after proper notice, and is struck off to a third person, it will require a strong case, and some peculiar exigency, to warrant a court in setting it aside.

We think the order setting aside the sale made on March 5, 1888, to William Stimer and Wyman Stimer should be vacated, set aside, and held for naught, and also all subsequent orders for resale, and sales and deeds made in pursuance thereof, should be vacated, set aside, and held for naught; and it will be so decreed. William

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Stimer and Wyman Stimer will recover their costs of this Court against Nicholas Kress and Harry Allen.

MORSE, LONG, and GRANT, JJ., concurred.

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CLARENCE A. BLACK v. WALTER O. ASHLEY ET AL.

Common carriers—Contract—Loss by fire—Delivery of goods to warehouseman.

1. Acquiescence by consignees for a number of years in the delivery of freight by a common carrier to *independent* warehousemen, from whom they received it, as also notice of its arrival, and to whom they gave the necessary receipts, will relieve the carrier from liability for its safe-keeping upon its delivery to such warehousemen.

2. The following general propositions are summarized from the opinion of Mr. Justice LONG:

   a—At common law, a common carrier is responsible on implied contract for all loss of, or injury to, goods received for carriage, unless caused by the act of God or the public enemy or the fault of the owner.

   b—A common carrier may limit his liability for loss to his own line; citing *Railroad Co. v. Bank*, 20 Wis. 122; *Irwin v. Railroad Co.*, 59 N. Y. 653; or he may by special contract extend such liability so as to cover a *safe* delivery at the place of destination; citing *Railroad Co. v. Pratt*, 22 Wall. 124; *Noyes v. Railroad Co.*, 27 Vt. 110.

   c—In Michigan, in the absence of an express contract, or one fairly inferable from the nature of the business, the known necessities under which it is carried on, and the established usage on the subject, a common carrier cannot relieve itself from responsibility *as such* by depositing the goods in its warehouse at the end of its route; citing *Buckley v. Railway Co.*, 18 Mich. 121; *Feige v. Railroad Co.*, 62 Id. 1.

   d—U. S. Rev. Stat. § 4282, exempting vessel-owners from liability by reason of loss of or damage to goods by any fire happening to or on board of the vessel, is limited in its application to fires happening on ship-board

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e—As a general rule, by usage and common custom, railroad carriers may deliver freight at their depots, freight-houses, or stations, and be relieved of the burden of actual delivery at the place of business of the consignee, and of their common-law liabilities as common carriers, by notice to the consignee, and reasonable time thereafter to remove them. Persons delivering them goods to carry are supposed, in the absence of special contract, to understand such usage or custom, and to contract with reference to it; citing *Strong v. Railroad Co.*, 15 Mich. 206.

f—Before any custom can be admitted into the law, it must appear that the usage has been general and uniform, the custom peaceably acquiesced in, and not subject to contention and dispute, and it must be certain; citing Broom, Leg. Max. (5th Am. ed.) *828.

Error to Wayne. (Brevoort, J.) Argued January 22, 1890. Decided April 11, 1890.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Marston, Cowles & Jerome, for appellant, contended:

1. At common law, independent of statute, carriers by water and by land are on the same footing; citing *Ex parte Easton*, 95 U. S. 68, 75; *The Eddy*, 5 Wall. 481, 495; *McAndrew v. Whitlock*, 52 N. Y. 40; *Crosby v. Fitch*, 12 Conn. 410; *Hastings v. Pepper*, 11 Pick. 41; *McArthur v. Sears*, 21 Wend. 190; and carriers by sea and by inland waters are under the same obligation; citing *McAndrew v. Whitlock*, 52 N. Y. 40.
2. In this State a carrier's liability continues after the arrival of the goods until notice to the consignee, and a reasonable opportunity for their removal; citing *Buckley v. Railroad Co.*, 18 Mich. 121, 129–132; *Condon v. Railroad Co.*, 55 Id. 218; *Feige v. Railroad Co.*, 62 Id. 1, 4; and see *Redmond v. Steamboat Co.*, 46 N. Y. 578.
3. In this case, as to two of the consignments, no notice was given, and, as to the others, notice was given at 11 A. M. of Saturday, and the fire occurred at 1 A. M. of the following Monday.
4. As to what is reasonable notice and time, counsel cited *McMillan v. Railroad Co.*, 16 Mich. 79, 122, where two hours and a half was held insufficient, and *McAndrew v. Whitlock*, 52 N. Y. 40, where it is held that it is such as gives the consignee time enough under all proper and ordinary circumstances, and

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proceeding in the ordinary mode of those engaged in the same kind of business, to provide for the care and removal of the goods.

5. Defendants contend that the custom of closing down on Saturday afternoons cannot affect their rights. But usage as to the manner of doing business enters into a contract as a part of it, in the absence of any express contract covering that point; citing *Darling v. Railroad Co.*, 11 Allen, 295; *Loveland v. Burke*, 120 Mass. 139, 142; 2 Pars. Cont. 187 (note); and the custom here was uniform, certain, and reasonable, and so binding; citing *Strong v. Railroad Co.*, 15 Mich. 206, 220; *Ledyard v. Hibbard*, 48 Id. 421; *VanHolsen v. Cameron*, 54 Id. 609.

6. Defendants also contend that when the goods were placed in the warehouse they ceased to be common carriers; citing 4 Term Rep. 582, 5 Id. 397, 400, which cases have been overruled in *Railroad Co. v. Manfg. Co.*, 16 Wall. 318; *Condon v. Railroad Co.*, 55 Mich. 218, and *McAndrew v. Whitlock*, 52 N. Y. 40, 52.

S. S. Babcock, for defendants, contended for the doctrine stated in the opinion.

LONG, J. The defendants Walter O. Ashley and John P. Clark were partners in business, and owned the steamer Alaska, which they used in domestic commerce on the lakes between Sandusky, Ohio, and Detroit, this State. After this action was commenced John P. Clark died, and the cause was revived against Samuel S. Babcock, Charles Clark, and Everett N. Clark, his executors.

It appears that Freund Bros., Burnham, Stoepel & Co., and the Black Hardware Company were severally consignees of certain invoices of goods brought by the steamer Alaska from the city of Sandusky to Detroit in July, 1887, and deposited in the warehouse of Ashley & Mitchell. The warehouse and all the goods were destroyed by fire occurring a little after midnight on August 1, 1887. The parties all assigned their claims to Clarence A. Black, the plaintiff, for the purpose of bringing this suit. The parties, being in court ready for trial, in open court consented that the jury impaneled be discharged,

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and that the trial proceed before the court without a jury. After the trial the court made the following findings of fact:

"1. That on July 30, 1887, Freund Bros., of Detroit, purchased from George P. Benjamin, of New York, certain goods, of the value of $298.55; that on July 26, 1887, Burnham, Stoepel & Co., of Detroit, purchased from Wise Bros., of Baltimore, Md., goods of the value of $168; that on July 25, 1887, the Black Hardware Company, of Detroit, purchased from W. D. Wood & Co., of Pittsburgh, Penn., certain sheet iron, of the value of $474.32; that on July 27, 1887, said Black Hardware Company purchased from the Sandusky Tool Company, of Sandusky, Ohio, carpenters' planes, of the value of $117.96; that it is alleged in the declaration how goods were shipped, but there was no evidence introduced tending to show, and I am therefore unable to find, by what mode of conveyance the goods purchased in New York, Baltimore, and Pittsburgh reached Sandusky, Ohio.

"2. That the goods so purchased in New York, Baltimore, and Pittsburgh were received by the steamer Alaska at Sandusky, Ohio, for carriage to Detroit, on July 29 and 30, 1887, and bills of lading given by said steamer Alaska therefor, in the words and figures following:

"'BALTIMORE & OHIO RAILROAD.

"'(Lake Erie Division.)

"'Slip No. 161.

SANDUSKY, O., July 30, 1887.

"'Shipped by Baltimore & Ohio Railroad (Lake Erie Division), in good order and condition, on board the steamer Alaska,—Fox, master,—the following articles, marked and consigned as per margin, to be delivered in like order and condition (the dangers of fire, collision, and navigation only excepted), as addressed in the margin, subject to freight and charges as below. All property on deck at the risk of the vessel and owners.'

"Then followed on such receipt the name and residence of consignees, description of goods, and rate of freight.

"3. That the goods purchased of the Sandusky Tool Company were on July 29, 1887, taken by the said company to the wharf of the I., B. & W. Railway Company, in Sandusky, the said wharf being the place where the steamer Alaska stopped at Sandusky to receive freight consigned to Detroit; that C. B. Lockwood, the

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agent of said railway company, received and receipted for freight for the steamer Alaska, using one of the printed bills of lading of the I., B. & W. Railway Company, containing a clause exempting carrier from loss by fire, which was the invariable custom, but there was no evidence tending to show, and I cannot therefore find, that the Sandusky Tool Company or the consignees saw said bill of lading, or assented to its terms, but the evidence did show they were acquainted with the bill of lading uniformly used by the Alaska when receiving shipments from the Sandusky Tool Company which were similar to these; that in said bill of lading the goods were designated as 'handles;' that said C. B. Lockwood had been acting as agent for said I., B. & W. Ry. Co. at Sandusky since 1874, and receipting as above for the steamer Alaska during the same period; that, acting in such capacities, he knew that the Sandusky Tool Company, during all of said years from 1874, shipped all goods manufactured and sold by it, which included carpenters' planes, as handles, excepting picks and hoes; that the rate would have been the same if the goods in question had been shipped as planes, the iron and steel in a plane being of no greater value and not so bulky or heavy as the wood.

"4. That at the time of such shipments, and for a long time prior thereto, said steamer Alaska was owned by John P. Clark and Walter O. Ashley, who were engaged and acting as common carriers of freight and passengers, using said boat for such purpose, between Sandusky, and certain other points in the state of Ohio, and Detroit, in the State of Michigan; that as such common carriers they received all of said goods on board said steamer at Sandusky to be carried to Detroit for the consignees; that said goods were carried as aforesaid, and the goods consigned to the Black Hardware Company reached Detroit about midnight of Friday, July 29, 1887, and were at once, in accordance with the usual and uniform custom, turned over to Ashley & Mitchell, a firm composed of the said Walter O. Ashley and Mitchell, and by them placed in their warehouse; that the goods consigned to Freund Bros. and to Burnham, Stoepel & Co. reached Detroit about midnight of Saturday, July 30, 1887, and were in like manner placed in said warehouse, and that said warehouse was a reasonably safe and proper place in which to place said goods.

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"5. That it was the custom and practice of said Ashley & Mitchell to notify consignees of the arrival of goods in their warehouse from said steamer, and that no other notice had ever been given to consignees; that on Saturday, July 30, 1887, notice was sent by said Ashley & Mitchell to said Black Hardware Company, and received at 11 A. M., of the arrival of the goods consigned to said firm; that in July, 1887, and for a number of years previous thereto, it had been the uniform custom of all wholesale merchants in the city of Detroit to close their places of business during each summer season, commencing in 1885 at four o'clock in the afternoon, in 1886 at three o'clock, and in 1887 at one o'clock in the afternoon of Saturday in each week, and not to receive any freight or transact any business after that hour, which custom was well known; that said Black Hardware Company was engaged in the business of wholesale dealers in hardware during the year 1887; that owing to the fact that said goods consigned to Freund Bros. and Burnham, Stoepel & Co. arrived late on Saturday night, July 30, no notice was sent to the consignees of their arrival; that each of the said firms represented in said cause had been in the habit of receiving goods shipped by steamer Alaska, and had never received any notice of the arrival thereof from the owners of said Alaska, but always received notice from said Ashley & Mitchell.

"6. That about one o'clock on Monday morning, August 1, 1887, the said warehouse of Ashley & Mitchell caught fire, through no fault or carelessness of the owners thereof, and the said goods were totally destroyed.

"7. That said Freund Bros., Burnham, Stoepel & Co., and the Black Hardware Company severally assigned their respective claims against the owners of said steamer Alaska for the value of said goods so destroyed by fire to Clarence A. Black, plaintiff herein, which said assignments were made prior to the commencement of this suit."

Upon these facts the circuit court of Wayne county directed judgment for the defendants. Plaintiff brings error.

The plaintiff contends:

1. That the liability of the defendants as common carriers continued after the arrival of the goods, and their

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deposit in the warehouse of Ashley & Mitchell, until notice to the consignees, and a reasonable time thereafter to remove them.

2. That the notice to the Black Hardware Company, given at 11 o'clock on Saturday, did not give that firm reasonable time thereafter to remove their goods on that day, as they were accustomed to close at 1 o'clock on Saturday, which custom was well known.

3. That the contract of carriage, limiting the common-law liability of the defendants as to the "dangers of fire and collision," applied only to fires happening on ship-board, and not to fires happening on the wharf or in a warehouse after unloading.

It is claimed, therefore, that the plaintiff is entitled to recover for the value of the whole goods by reason:

1. As to the Black Hardware Company's goods, they did not have reasonable time to remove the goods after notice from Ashley & Mitchell; and—

2. As to the balance, no notice at all was given.

By the general doctrine of the common law, a common carrier is responsible on the implied contract for all loss of, or injury to, goods received for carriage, except in case of loss caused by the act of God or the public enemy or the fault of the owner. The common carrier may in all cases expressly stipulate with the owner not to be liable for goods carried beyond the proper point for transferring to another carrier; or, in other words, limit his liability for loss to his own line (*Railroad Co. v. Bank*, 20 Wis. 122; *Irwin v. Railroad Co.*, 59 N. Y. 653); or he may by a special contract extend his liability, and agree to deliver the goods safely to the consignee at the place of destination (*Railroad Co. v. Pratt*, 22 Wall. 124; *Noyes v. Railroad Co.*, 27 Vt. 110). It is now generally conceded that a carrier may by contract limit his common-law liability as a common carrier.

The law has been settled in this State that, in the absence of an express contract, or a contract fairly infer-

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able from the nature of the business, the known necessities under which it was carried on, the established usage upon the subject, and the like, the carrier can not excuse itself from responsibility as such carrier by depositing its goods in its warehouse at the end of its route. *Buckley v. Railway Co.*, 18 Mich. 121; *Feige v. Railroad Co.*, 62 Id. 1 (28 N W. Rep. 685).

The contract of carriage in the present case is as follows:

"Shipped by Baltimore & Ohio Railroad (Lake Erie Division), in good order and condition, on board the steamer Alaska,—Fox, master,—the following articles, marked and consigned as per margin, to be delivered in like order and condition (the dangers of fire, collision, and navigation only excepted) as addressed in the margin, subject to freight and charges as below. All property on deck at the risk of the vessel and owners."

Then followed on such receipt the name and residence of consignees, description of goods, and rate of freight.

This was a contract, therefore, to transport the goods from Sandusky, Ohio, to Detroit, and deliver them to the consignees, and the common-law liability of the defendants, as insurers, was in no way limited by the contract itself, except as to dangers of fire, collision, and navigation. It is claimed by defendants that this limitation as to fire falls within the exemption contained in section 4282 of the Revised Statutes of the United States, which provides:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

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The express language of this act, it will be noticed, limits its application to fires happening on ship-board; and, as said by Brown, J., in the case of *The Egypt*, 25 Fed. Rep. 320, the design of the statute was "to give relief against the consequences of fires incident to navigation." Here the loss occurred by fire, after the goods were unloaded and placed in the warehouse of third parties. The act and the contract limiting liability had no reference to such a loss.

By the terms of the contract, therefore, the defendants agreed to deliver the goods to the consignees at Detroit in as good order as when taken. But the court below found, and that finding is conclusive upon us, that a custom had existed for a number of years, and which was well known to the consignees, and in which they had for a long time acquiesced, for the Alaska to unload its goods, and store them in the warehouse of Ashley & Mitchell, a firm entirely independent of the Alaska, and who were accustomed to give notice of the arrival of such goods to the various consignees, and that such consignees were accustomed to receive their goods directly from Ashley & Mitchell, and not from the Alaska.

The obligation of the carrier is not generally discharged until he properly delivers the goods he undertakes to deliver to the consignee or other person according to the terms of the contract. The particular mode of delivery, or what may constitute a delivery, may depend, however, upon various circumstances. As a general rule, by usage and common custom, railroad carriers may deliver freight at their depots, freight-houses, or stations, and be relieved of the burden of actual delivery at the place of business of the consignee, and be also relieved of their common-law liabilities as common carriers, by notice to the consignee, and reasonable time thereafter to remove them. And persons delivering them goods to carry are supposed,

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in the absence of special contract, to understand such common usage or custom, and to contract with reference to it. *Strong v. Railroad Co.*, 15 Mich. 206.

Before any custom can be admitted into the law, it must appear that the usage has been general and uniform, the custom peaceably acquiesced in, and not subject to contention and dispute, and it must be certain. Broom, Leg. Max. (5th Amer. ed.) * 828. Here the facts are not in any manner in controversy that the defendants were accustomed to leave all freight transported by the Alaska with Ashley & Mitchell, and they gave the notice to the consignees. The consignees in the present case had for a long time acquiesced in the arrangement. Under such circumstances, it cannot be said that the defendants regarded their liability as common carriers as continuing until Ashley & Mitchell had given the notice to the consignees, and a reasonable time thereafter had elapsed to remove the goods. The contract of carriage must be construed in the light of the surrounding circumstances, and the custom which prevailed of depositing the goods with third parties, from whom the consignees not only received the notice, but to whom they receipted; and in this view of the case the liability of the defendants as common carriers ended when they had safely deposited the goods with Ashley & Mitchell. It cannot matter, so far as the rights of the defendants are concerned, that Ashley & Mitchell may not be holden to any greater liability than that of warehousemen. The consignees had assented by custom to receive the goods in this manner, and the delivery to Ashley & Mitchell in as good condition as when taken relieved the defendants from any further responsibility under the circumstances.

If Ashley & Mitchell had been an intermediate carrier, and there was nothing appearing in the contract of

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carriage by which the defendants as first carriers were holden as insurers to the end of the route, then, under well-settled rules, the defendants would have been relieved of all liability by a safe delivery to Ashley & Mitchell. *Rickerson Roller-mill Co. v. Railroad Co.*, 67 Mich. 110 (34 N. W. Rep. 269); *Detroit & Bay City Ry. Co. v. McKenzie*, 43 Id. 609 (5 N. W. Rep. 1031); *Pratt v. Railroad Co.*, 95 U. S. 43. In the present case, by a custom long acquiesced in, the defendants made the delivery to Ashley & Mitchell on the arrival of the Alaska in Detroit, and could no longer be held liable for safe-keeping. In this view of the case it is unnecessary to discuss the other questions raised.

The judgment must be affirmed, with costs.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred.

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GEORGE H. CHAPEL v. CHARLES P. SMITH AND GEORGE R. PARKER.

Easement—Diversion of water—User—Evidence.

1. An action for consequential damages sustained by a land-owner by reason of the diversion of water onto his lands by the action of a drain commissioner in opening a tunnel and maintaining it as a public drain, which damage occurred some three years after such opening, cannot be maintained against a contractor who performed such work, no permanent damage being done to the freehold which the discontinuance of such flowage would not remove.

2. The right to discharge a drain upon the lands of another cannot be acquired by 20 years' user, unless the drain be one and the same, and the use thereof uninterrupted during the whole period (*Cotton v. Manufacturing Co.*, 13 Metc. 429);

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and the measure of such right is not the dimensions of the drain, but the quantity of water discharged upon said land.

3. No one has the right, without redress, to flood the wild lands of another, or to add to the water upon them, because no present special damage can be shown.

4. A drain commissioner cannot, under the law, in laying a public drain, empty water upon the lands of another that does not belong to him, without providing a proper outlet for its passage from his premises; and if he does so he is responsible for the consequent damages. *Cubit v. O'Dett*, 51 Mich. 351; *Ashley v. Port Huron*, 35 Id. 296.

5. In a suit involving, as an issue, the consent of a land-owner to the diversion of water upon his lands, he may show all things done by him, or by others in his behalf, by way of protest or remonstrance against such diversion.

Error to Genesee. (Newton, J.) Argued January 22, 1890. Decided April 11, 1890.

Case. Plaintiff brings error. Affirmed as to Parker and reversed as to Smith. The facts are stated in the opinion.

David P. Halsey and *Frank B. Leland*, for appellant.

Lee & Aitken and *A. W. Davis*, for defendants.

[The points of counsel are stated in the opinion, where the authorities are discussed.—REPORTER.]

MORSE, J. The plaintiff sued defendants in the Genesee circuit court for damages to his premises by the opening of a tunnel through a natural embankment by reason of which a large amount of water, contrary to its natural flow, was let down upon and across his lands.

The plaintiff alleged in his declaration that he was the owner of 80 acres of land, situated in the township of Grand Blanc, in Genesee county, occupied and tilled by him for farming purposes; that in 1884 said land was properly drained by good and sufficient drains, the main

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drain being laid out and constructed by the township drain commissioner of the width of 10 feet, and of the depth of 3½ feet, and that it was amply sufficient to carry away all the water which would fall upon said lands, or which would flow thereon from all other lands naturally draining upon the same.

"That about one mile east of plaintiff's said land there is a natural embankment or rise of land running north and south, which forms a barrier against all the water above and to the east of it, said embankment consisting of a hill, the lowest point of the crest of which is about 15 feet above the highest point reached by accumulations of water from above and the east at any time; that above and to the east of it, and easterly from said embankment, there is a large tract of several hundred acres of land, the drainage from which is naturally stopped by said natural embankment from flowing down upon plaintiff's said land, the water accumulating upon said tract of land situated to the east of said embankment naturally flowing off from said land in a north-easterly direction, flowing entirely away from and never touching plaintiff's said land.

"That in the spring and summer of 1884, unlawfully and wrongfully, and to the great damage of said plaintiff, defendants, by themselves, their agents, and employés, dug and opened a large tunnel, filling the same with a crock tile about 23 inches in diameter, directly under and through said embankment, being a distance of about 15 rods, which was capable of emptying, and which did empty, great volumes of water, the accumulations from said tract of land to the east of said embankment, out into a fertile valley, leading directly onto plaintiff's said land, said plaintiff's land forming a part of said valley; that the result of digging said tunnel was to cast upon plaintiff's land a large volume of water, which otherwise would not have flowed in that direction; that said tunnel did not empty into any ditch or trench, and that no means whatever were or ever had been employed to convey the water to any place beyond a few rods beyond the mouth of said tunnel; and that so great was the quantity of water which flowed through said tunnel that at certain times of the year it continued flowing constantly for several days at a time.

"That said wrong and injury had so continued from

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the opening of said tunnel by defendants down to the time of the commencement of this suit; and that the consequence of the digging and constructing said tunnel by said defendants was to do away with said natural barrier to the water formed by said embankment, and to cause a large quantity of water to flow down upon plaintiff's said land which otherwise would not have done so, bringing with it pieces of wood and brush and other refuse.

"That the water and refuse flowing and deposited upon plaintiff's said land had destroyed the crops on from 12 to 15 acres thereof for several years, and that the land had been permanently injured thereby, and the crops destroyed, to the great damage of said plaintiff."

Another count charges that the depositing of said drift-wood has created an intolerable public nuisance, and has caused, by said coming down of water and drift-wood, whenever the same comes down upon his premises, an intolerable and unhealthy stench, which fills the air with malaria and impurities, and endangers the health of plaintiff and his family, and that of his neighbors in the vicinity, and which stench is an intolerable and public nuisance; and also that said land has already been permanently injured thereby, and plaintiff's ditches filled up and permanently obstructed by said refuse and sand, and the water standing on said land has caused it a permanent injury.

The defendants pleaded the general issue, and gave notice under such plea that they would prove that the tunnel complained of had been in continuous existence for more than 15 years previous to the time that the defendants in the declaration are alleged to have constructed it, and that it was originally built and maintained by the Flint & Holly Railroad Company and the citizens of Grand Blanc in that vicinity, and the public had a right thereto, and a public drain called the "Seaver Ditch" or "Cook Drain No. 2" was constructed

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years ago to furnish an outlet for the water passing through it.

That at the time the work complained of was done defendant Smith was drain commissioner of Grand Blanc, and was acting as such commissioner, and by virtue of proceedings instituted under the drain law, by a petition signed by 25 freeholders of said township, and that the work was performed as a public improvement legally instituted upon said petition, and on proceedings, based thereon, by said Smith as drain commissioner, who had established said tunnel and made it a part of the drain prayed for in said petition, and which was established by said commissioner after the necessity therefor had been determined, not only by him, but by special commissioners appointed by the probate court of Genesee county; that the said tunnel is a part of the "Parsons Drain," so known and established, and is now a public township drain; and that Smith, in cleaning out said tunnel and putting crocks therein, instead of the plank then in said drain, only did his duty, and did not increase the flow of water therein.

That other public drains carry large volumes of water onto plaintiff's land, and, if he has been damaged, such damage has been occasioned by his own negligence in not constructing or procuring a proper and sufficient outlet for said water; that the water, after leaving said tunnel, passes into a public drain, and in said drain through a level fertile valley, for more than a mile, before it reaches plaintiff's land, and flows over plaintiff's premises through a public water-course,—a township or county drain,—made to receive it more than 15 years before this suit was brought, and that the defendants and the public generally have acquired a right to have the water flow therein; and that the defendant Parker had nothing to

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do with the work, except to lay the crocks and clean out the tunnel under contract.

Upon this issue a large amount of testimony, reaching back more than 40 years, was taken, at the close of which the circuit judge directed a verdict for the defendants, upon the ground that there was a public drain where the waters coming through from this tunnel where discharged, which had existed for over 20 years, and that the tunnel was part of said drain; and that Smith, acting as drain commissioner, and Parker, taking the contract under him, were justified in what they did.

It is claimed by the plaintiff that he had a right to go to the jury on several propositions of fact in the case. The testimony shows that, in a state of nature, the land now occupied by plaintiff, or the portion claimed to be injured, as well as much of the land in his immediate vicinity, was a willow swamp, with some tamaracks growing therein. East of the point where this tunnel was constructed was a marsh. This marsh was a mile or so east of the plaintiff's land, and upon land taken up and now owned by Edward Parsons. Upon the west side of this marsh was a high ridge of hard land, called a "hog-back." The natural flow of the water upon this marsh was to the north and east, and away from plaintiff's land. But upon the west side of the hog-back, and lower than the marsh on the east side, and upon the land of Mr. Parsons, was low, wet, and swampy land, part marsh and black ash swale, forming a depression or valley, running towards and upon plaintiff's land, the surplus waters of which ran through this depression down into a creek or well-defined water-course below plaintiff's land. Plaintiff purchased his land in 1877, and has since been living upon it.

The plaintiff himself testifies, and it is also established by other testimony, that in 1878 he, with others, called

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out the drain commissioners, and had a "big ditch," 10 feet wide and 3½ feet deep, put through this valley. This ditch ran back towards the ridge, within from 20 to 100 rods of the tunnel, and it crossed the plaintiff's land. He swears that there were evidences of an old ditch there at that time,—"a narrow ditch, nearly filled up." One of his witnesses, Thomas Pollock, testifies that this old ditch was laid in 1863, and crossed plaintiff's land, and also went up to within 20 rods of the tunnel, and that it was called the Seaver ditch, and was a small ditch. The work in 1878 seems to have been a clearing out, enlarging, and straightening of this old ditch, and since then it has been kept open and maintained as a public drain.

The plaintiff's own witnesses also establish the fact that a tunnel was opened through this ridge or hog-back as early as 1866. This tunnel was constructed by the Flint & Holly Railroad Company, who put a box or plank drain through in the same place where the defendants committed the alleged wrong against plaintiff. Pollock also testifies, and there seems to be no doubt of it from other testimony, that, in 1862, Parsons, who owned the land on both sides of the ridge, put a small blind ditch through the hog-back, which let some water through from the eastern upon the western marsh, and into the valley below. This ditch, however, was not where the tunnel now is, but some rods from it. The drain put in by the railroad company rotted, and then they put in a triangular box-drain. This last drain began to cave in in 1881, and in 1883 or 1884, about the time of the action of defendants, had fallen in so that no water ran through the box-drain. The capacity of this tunnel from 1866 to 1881, from testimony given by plaintiff's witnesses, seems to have been as great for carrying off water as it has been since the crocks were put in. This testimony

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shows, also, that the flow of water upon plaintiff's land has increased latterly year by year. This is partially accounted for by the fact that the area of ground drained by the tunnel has been increased by parties east of the ridge draining their lands into the eastern marsh. It also appears that in the years most complained of by plaintiff the damage was caused by heavy and unusual freshets. It also appears that at the particular time the crocks were put in by Smith and Parker the water had washed a hole through the ridge where this box tunnel had been, and that such hole was capable of discharging more water in a given time than the tunnel as now constructed. The reason of Smith's action as to this drain seems to have been this:

In 1856 a plank road was built across this eastern marsh. This highway was never overflowed until 1866, or about the time the Flint & Holly Railroad was built across the same marsh to the east of the highway. The railroad company put a culvert under its embankment, and its ditches let more water down towards the highway, the lowest part of the marsh being near the place where the tunnel is. The tunnel was originally constructed by the railroad company to relieve the highway. There was some talk at the time about injury to the lower proprietors, and the railroad company wanted the township board to indemnify it against liability for such damage, but what was done in this regard does not clearly appear, nor is it material. In 1883 and 1884 the highway was overflowed, and Smith was called upon as drain commissioner to open a public drain through the tunnel.

No documentary evidence was given on the trial as to the proceedings, but, without objection, both sides went into the matter, and it appears that the probate court, the parties interested appearing by counsel, Judge Long acting for the people below the tunnel, appointed three

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special commissioners, who determined the necessity of this drain, and that the tunnel was cleaned out, and a 20-inch crock put in.

I cannot see how this action can be maintained against the defendant Parker. He was employed by, and acted entirely under the direction of, the defendant Smith. The act of cleaning out the tunnel or the putting in of the crocks was not a direct trespass as against plaintiff, and no consequential wrong or injury was occasioned him thereby until nearly a year afterwards, and that so slight that he made no particular note of it. The tunnel was on the lands of Parsons, and the injury to plaintiff of which he complains was not the immediate result of Parker's work, but has rather been caused by the subsequent maintenance of this tunnel. It appears from plaintiff's own testimony that he was first injured by this tunnel in 1880, four years before the putting in of the crocks. There was a heavy freshet that year. The tunnel was dug out by Parker in June or July, 1884. In regard to the damage that year, plaintiff testifies:

"*Q.* What damage did you sustain that year after the digging out of the tunnel?

"*A.* Some, but not so much as I have other years. The tunnel was not dug out, if I remember right, when the spring rains came; but there was something on the flat that damaged some, but not so much, that year.

"*Q.* The different years since 1884,—just take it along by the year, and state about how much, in your opinion, you have been damaged by this overflow.

"*A.* I can hardly state; some years it would not amount to a great deal. There has not been so very much until last year" (1887).

He further states that his damage was the greatest in 1887, and next to it was the year 1880. The testimony of all the witnesses shows that there were unprecedented floods or freshets in both of these years. One witness swears that Chapel had from three to five acres of corn

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ruined in 1884, and that some 15 or 18 acres of his land was overflowed, but this was before the crocks were put in, and in the spring. His son also testified to damage done to hay and corn in the spring of 1884, but he gives no damage happening that year after Parker's work, and his father, the plaintiff, when brought upon the stand afterwards, was asked on cross-examination, and testified, as follows:

"*Q.* How much were you damaged in 1884, the spring when that big freshet was?

"*A.* Well, sir, if I remember right, the tunnel was stopped after it caved in until the freshet was over.

"*Q.* Your boy said there was 12 or 15 acres overflowed in the spring.

"*A.* I hardly think he said that.

"*Q.* Will you swear he didn't?

"*A.* No; I wouldn't swear he didn't.

"*Q.* Will you swear there was not 15 acres overflowed on that place in the spring of 1884?

"*A.* I don't remember that there has been a spring when the water comes down from above but what it overflows,—did this year.

"*Q.* Always been 15 acres overflowed?

"*A.* Somewhere; not quite as much as last year.

"*Q.* How much was overflowed in 1883?

"*A.* I have not got any damage for 1883. I didn't look to find out what the damage was in 1883.

"*Q.* What was it in 1882?

"*A.* I had oats over on the south side, and there was that patch I spoke of that was killed out again. That same patch has been killed out pretty nearly every year since 1880. We have been flooded from two to three times a year. We had a flood this spring.

"*Q.* Did you ever since you have lived there see such a flood as there was last spring?

"*A.* I never knew it to come down so quick, hardly. It came down very much quicker than it used to.

"*Q.* Did you ever see it rain as hard?

"*A.* For a little while it did rain pretty hard, but not a great while.

"*Q.* Did you ever see it rain as hard before?

"*A.* I don't know."

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At this time he further stated that he suffered some damage in 1885 and 1886, but that he had only stated two different damages in 1880 and 1887, when everything was killed out. There was no testimony whatever of any damage in the year 1884, after the work complained of by Smith and Parker was done. This tunnel has not been maintained by Parker since 1884, and he has no authority over it, or any dominion over the soil in which it is planted. The labor he did in cleaning it out and putting the crocks in was that of a contractor or hired man. He has not done anything since towards keeping it there, and has had no right to meddle with it in any way. By what rule of law is he to be held responsible for the damage done by it in 1887, the year for which plaintiff seeks to recover, or even for the damage done in 1885 or 1886, if any? If he can be held for these years, he can be held indefinitely, when he has no power or right to close this tunnel. Somebody may be maintaining it, but Parker is not responsible for it. If Parker had placed the tunnel upon his own land, and had power and dominion over it, so that he could maintain it or abate it as he chose, then I could see some reason and some theory in the law by which he could be held responsible for the damages occasioned by it, but I confess, as it is, I can see none.

In my opinion, no cause of action was shown against Parker. No evidence was given of any permanent damage to the freehold which the discontinuance of the flowing would not relieve, as in the case of *Cubit v. O'Dett*, 51 Mich. 348 (16 N. W. Rep. 679). Here the only damages claimed were for injury to crops caused by the overflow during certain years, more especially for 1887, three years after the crocks were put in this tunnel. It was, however, said in that case, at page 350:

"The existing ditch might be obstructed without going

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upon the plaintiff's land for the purpose, but as it is not upon the land of the defendants, *and they are doing nothing, so far as we know, to keep it open, there may be question whether they are liable from day to day,* as a man may be who maintains a nuisance on his own premises."

In Smith's case he was still drain commissioner at the time this suit was brought, and had been such officer ever since the crocks were put in. There is no doubt, from the whole evidence, that he was acting as drain commissioner when he ordered the work done. If his action was not legal and was wrongful as against plaintiff, he must be held responsible for what damage has been done him. He has had charge of this tunnel, as such drain commissioner, and must be considered as the person maintaining it.

The circuit judge should have submitted to the jury the question whether more water flowed upon plaintiff's land after the work of Smith than before. It is true I think, as heretofore stated, that it was practically undisputed from the whole testimony that the capacity of the crocks was not greater than that of the box-drains for carrying water through this tunnel; in other words, as much water could have run through the box-drains as through the crocks; and it is also true, I think, that the increase of water flowing through the tunnel, and upon plaintiff, is mainly, if not entirely, due to the fact that cat-holes and other wet places above the tunnel have been drained into this eastern marsh. But while Smith may not have increased the capacity of and did not enlarge this tunnel, when we come to the prescriptive right claimed by defendants to flow plaintiff's land by the maintenance of this tunnel we must remember that the measure of such right is not the dimension of the tunnel, but the quantity of water taken down upon his premises by it. *Turner v. Hart,* 71 Mich. 128 (38 N. W. Rep. 890).

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That a prescriptive right to flow this water upon plaintiff's land could be acquired by 20 years of adverse user seems to be settled in this State. *Conklin v. Boyd*, 46 Mich. 56 (9 N. W. Rep. 134); *Gregory v. Bush*, 64 Id. 37 (31 N. W. Rep. 90). But, like any other right gained by adverse user, it must be limited by the extent of the user, and the right to discharge a drain upon the lands of another cannot be acquired by 20 years' user, unless the drain be one and the same, and the use thereof uninterrupted during the whole period. *Cotton v. Manufacturing Co.*, 13 Metc. 429. Therefore the drain or blind ditch put in by Parsons does not count at all, and is of no importance in this case.

The tunnel builded by the railroad company in 1866 was put in without right, and there is testimony tending to show that in 1883 and 1884, if not before, the same had got out of repair and fallen into disuse. If this should, upon another trial of this case, be found to be a fact, the question of adverse user would be out of the case, and the only matter to be determined would be the lawfulness of Smith's action in the premises, and, if unlawful, the damages resulting therefrom. It must be conceded that by this tunnel the water was diverted from its natural flow and thrown upon plaintiff's land without right. The circuit judge thought, and so held, that this tunnel, having discharged the waters of this eastern marsh into the Seaver drain, which had existed for more than 20 years, the plaintiff could not now dispute the right which had grown up by adverse user. In this he was in error. The question of adverse user should have been submitted to the jury. If there was no drain there when Smith put the crocks in,—if the railroad company had abandoned it, or it had fallen into disuse for any length of time,—the continuity of the use had been broken, and Smith must be considered as responsible, the

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same as if no tunnel had ever existed through this ridge. If the tunnel had been continuously maintained by the railroad company since 1866, then it was for the jury to determine whether, since the intermeddling of Smith, the flow of water had been increased upon plaintiff's land.

Plaintiff's counsel claim that no prescriptive right to maintain this tunnel is shown, because Chapel could not complain of it until some special damage had been done him; that the land being wild and unoccupied, and a willow swamp, until 1877 or 1878, and no special damage accruing to him until 1880, the adverse use of this tunnel did not commence until then; that the injury not being direct, but consequential, his right of action must be founded upon special damage, and the bar against such right could not commence to run until some special damage was occasioned by the tunnel. We think the plaintiff or his grantors had a right of action when the tunnel was first put through this ridge by the railroad company, if by such tunnel any water was diverted from its natural flow, and thereby thrown upon his premises, no matter what was then the condition of his lands. Though entitled only to nominal damages, the right of action would exist. And no one would have the right, without redress, to flood the wild lands of another, or to add to the water upon them, because no present special damage could be shown.

But plaintiff's counsel are correct in their further claim that the—

"Right obtained by prescription is commensurate only with the right enjoyed, and that the extent of the enjoyment measures the right, and the privilege cannot be enlarged to the prejudice of another. Every increase in the volume of water turned upon the lower proprietors creates a new cause of action."

It follows, therefore, that, in any event, if by the main-

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tenance of this tunnel by Smith, as drain commissioner, more water has been thrown upon plaintiff's land than has flowed through it for 20 years before, Smith is liable for the damages occasioned by such increased flowage, if the tunnel was not legally laid out as a township drain; and he may also be liable if it was laid in conformity to the statute, if thereby the plaintiff was damaged by neglect to provide him with a proper outlet of the waters thrown upon his premises. If he has wrongfully maintained it, he is liable. If the tunnel was not legally laid as a public drain, then he is certainly liable for the damage done, if any, by reason of its construction and maintenance. If it is a legal drain, and properly laid, then the question would arise whether such drain could be established and maintained to the detriment of plaintiff without his consent. The plaintiff himself swears that when Smith was putting the crocks in, or about to do so, he protested against it. Smith said to him:

"Smith says to me, after we had talked awhile, he says: 'Now, if you will just keep quiet and hold on, you fellows, I will get a couple of hundred dollars, and help you dig out the outlet from below.' The consequence was I never appeared, and supposed he would do it. I supposed he would do that, and that would have satisfied me if he had dug the outlet. I think that was during the early part of 1884."

If Smith, as drain commissioner, had given plaintiff a proper outlet, there would probably have been no trouble. Certain it is that the drain commissioner could not, under the law, in laying a public drain, empty water that did not belong to Chapel upon him without providing a proper outlet to take it off his premises. If he did so, he would be responsible for the damages. *Cubit v. O'Dett*, 51 Mich. 351 (16 N. W. Rep. 679); *Ashley v. Port Huron*, 35 Id. 296. The case should therefore have gone to the jury upon the question of Chapel's damage,

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and whether or not the same was occasioned by water from this tunnel, or from other causes, and whether or not plaintiff had consented to this diversion of the water from its natural flow. If any claim of acquiescence is made by defendants upon another trial, everything done by plaintiff or others in his behalf, by way of protest or remonstrance against such diversion, would be admissible. Proper testimony of this kind was erroneously ruled out in the court below.

The court during the trial made this remark:

"It is a strange doctrine that the court should be kept a week at a time trying an action of trespass on the case for damages when the cause of complaint took place twenty odd years ago; it is a very singular doctrine."

This remark would have been highly improper if the questions of fact had been submitted to the jury. As the court directed a verdict, however, in keeping with this remark, no separate damage was done by it. It was, I think, competent to show that, when Smith put in this tunnel, the surveyor considered it practicable, and that it was practicable, to take the water off this marsh and highway in the direction of its natural outlet, and away from plaintiff's land, and that the railroad officials were willing that the proposed drain should go under or through the embankment of their road.

The judgment of the court below will be affirmed as to defendant Parker, with costs of both courts in his favor, and reversed as to the defendant Smith, with costs of this Court, and a new trial granted as against him.

CHAMPLIN, C. J., and GRANT, J., concurred. LONG, J., did not sit.

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THE CHIPPEWA LUMBER COMPANY v. THE PHENIX INSURANCE COMPANY.

Fire insurance—Amount of loss—Agreement to arbitrate as condition precedent to bringing suit—Waiver—Damages.

1. An insurance policy covering a stock of lumber contained an agreement to submit the amount of "loss or damage," in case of fire, to arbitration (the arbitrators not being named), payable only when so ascertained, which arbitration was made a condition precedent to bringing suit; and it is held that the agreement was reasonable and legal, and enforcible whether the loss was *total* or *partial*.

2. An insurance policy on a stock of lumber contained an agreement for arbitration as to the *amount* of loss, which was limited to the actual cost of producing the lumber destroyed. On receiving proofs of loss the company promptly informed the assured by letter that it disputed the *amount* of loss claimed in the proofs, and insisted that it be estimated under the contract, whereupon the assured at once brought suit; and it is held that the letter, if not a demand for, was not a waiver of, arbitration.

3. An insurance policy provided that in the event of loss the measure of damages should in no case exceed the actual cost of producing the lumber destroyed, which provision is construed as follows:

   a—If the assured bought the *logs*, he can recover the price paid, with interest from date of purchase, and the cost of manufacturing and storing.

   b—If he purchased the *stumpage*, such recovery is limited to the price paid, with like interest, and the other costs added.

   c—If he owned the lands from which the logs were cut, he can recover the fair value of the stumpage, with the other costs added, and interest.

4. The following general propositions are summarized from the opinion of Mr. Justice GRANT:

   a—Courts must interpret and give effect to contracts according to the clear intent of the parties as expressed in the writings they have deliberately executed.

   b—An agreement to submit *all* matters in controversy between parties to arbitration, and thus oust courts of their

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jurisdiction, is void, and may be repudiated by either party at any time before an award is made.

c—Either party to an arbitration may revoke the authority of the arbitrator, and this he may do notwithstanding the agreement to arbitrate is valid.

d—The case of *Nurney v. Insurance Co.*, 63 Mich. 638, is not understood as holding that an agreement to submit the ascertainment of unliquidated damages to arbitration, as a condition precedent to bringing suit, is invalid, or that either party thereto can revoke it at his own will; but that the right to such arbitration, upon the facts in that case, was waived, which waiver necessarily left the parties in the same situation as if no such agreement had been made, which is understood to be the doctrine of that case; and, if it was intended to establish a different rule, it is hereby expressly overruled.

e—A debtor waives no rights by his silence when he is not called upon to act.

Error to Mecosta. (Palmer, J.) Argued January 23, 1890. Decided April 11, 1890.

Assumpsit on insurance policy. Defendant brings error. Reversed. The facts are stated in the opinion.

Norris & Norris, for appellant.

M. Brown and *George A. Farr*, for plaintiff.

[The points of counsel are stated in the opinion.—REPORTER.]

GRANT, J. The defendant issued its policy of insurance to the plaintiff, September 1, 1887, insuring, against loss by fire, its stock of lumber, sawed timber, lath, and shingles, for one year, in the amount of $2,500. A fire occurred on May 3, A. D. 1888, consuming the larger part of the stock. The parties failed to agree upon the amount of the loss, and August 24, A. D. 1888, plaintiff brought suit.

The policy contained the following provisions:

"The amount of loss or damage * * * to be

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paid sixty days after the proofs of the same required by the company shall have been made by the assured, and received at the office in Chicago, and the loss shall have been ascertained by the arbitrators appointed, and proved in accordance with the terms and provisions of this policy. * * * * * * * * * *

"The amount of sound value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then be submitted to competent and impartial arbitrators,—one to be selected by each party,—the two so chosen, in case of disagreement, to select an umpire, to whom they shall refer each subject of difference, and the award of any two of them, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine * * * any other question, except only the amount of such loss or damage. * * * And until such proofs * * * are produced, * * * and arbitrations permitted and had, the loss shall not be payable. * * * * * * * * * *

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim, in the manner above provided, which is agreed to be a condition precedent. * * *

"It is hereby understood and agreed by and between this company and the assured that this policy is made with reference to the foregoing terms and conditions."

Upon receiving notice of the loss, the defendant sent an adjuster, who could not agree with plaintiff upon the amount of the loss or damage sustained. Thereupon plaintiff made out proofs of loss, and on May 16, 1888, forwarded them by mail to the defendant. They were received, and on May 22 defendant wrote plaintiff that it had examined the proofs and the information furnished by its adjuster; that its only concern was the amount of loss suffered for which it would be liable to contribute,

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and that the amount claimed was excessive. This letter contained the following language:

"We must insist, gentlemen, on estimating the loss under the contract."

It is also stated that defendant understood plaintiff's proofs to include manufacturing and trade profits, which were not covered by the policy.

The provisions of the policy here material to the issue on the question of damages read as follows:

"By this policy of insurance, the Phenix Insurance Company of Brooklyn, N. Y., * * * will indemnify the Chippewa Lumber Company against loss or damage by fire to the following specified and located property only, to an amount not exceeding the actual cash value of the property herein described at the time of such loss, and in no event to exceed twenty-five hundred dollars. * * * * * * * * * * *

"The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and, in the event of any claim for loss being made under this policy on the stock of any manufacturing establishment, the measure of damage shall in no case exceed the actual cost of producing the same."

It is conceded that the loss was on the stock of a manufacturing establishment.

After the letter of May 22, nothing appears to have been done by either party until the suit was brought. Upon the trial, plaintiff confined its evidence of damage to the market or cash value of the lumber destroyed; the defendant introducing no evidence of value. The court was requested to instruct the jury to find a verdict for defendant because—

1. No cause of action existed at the time suit was begun.
2. There was no evidence of plaintiff's damages according to the conditions of the policy.

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The circuit judge refused to so charge, and directed a verdict for plaintiff for $2,529.58.

The contention of plaintiff is that the arbitration clause is not a condition precedent to bringing suit; that it is revocable, and plaintiff revoked it by bringing suit; that defendant waived it; that it has no application to a total loss; and that the market value of the lumber is the measure of recovery.

1. Courts must interpret and give effect to contracts according to the clear intent of the parties as expressed in the writings they have deliberately executed. Applying this rule, we find no difficulty in determining upon what the minds of the parties met in making this contract of insurance. They agreed to submit the amount of loss or damage to arbitration; that it should be payable only after it had been so ascertained; that such arbitration should be a condition precedent to bringing suit; and that, in the event of loss, the measure of damages should in no case exceed the actual cost of producing the property destroyed. No other construction can be seriously contended for. There is no vagueness, uncertainty, or ambiguity in the terms of the policy.

It is conceded that an agreement to submit *all* matters in controversy between parties to arbitration, and thus oust courts of their jurisdiction, is void, and may be repudiated by either party at any time before award is made. Either party to an arbitration may revoke the authority of the arbitrator, and this he may do notwithstanding the agreement to arbitrate is valid. Any person may violate the most solemn contract he has made, but he thereby becomes responsible to the injured party for such violation. So, in the numerous cases cited by plaintiff's counsel, the courts held that those who had violated their contract to arbitrate where liable on their arbitra-

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tion bonds. But *non constat* that parties may not agree to submit the question of unliquidated damages to arbitration as a condition precedent to bringing suit. Plaintiff and defendant deliberately agreed to this method of ascertaining the damages. It was an expeditious, inexpensive, and proper method, if not a better one than is afforded by a suit. It was certainly as advantageous to one as to the other. They deliberately provided a penalty for failure to comply with this obligation. If plaintiff refused compliance, then it could not bring suit. If defendant refused compliance, then suit could be brought against it immediately. We hold the agreement reasonable and legal. It is sustained by the clear weight of authority. *Canal Co. v. Coal Co.*, 50 N. Y. 252; *Wolff v. Insurance Co.*, 50 N. J. Law, 453; *Dry-dock Co. v. Union Assurance Co.*, 66 Cal. 253 (5 Pac. Rep. 232); *Davenport v. Insurance Co.*, 10 Daly, 535; *Gauche v. Insurance Co.*, 4 Woods, 102; *Carroll v. Insurance Co.*, 72 Cal. 297; *Holmes v. Richet*, 56 Id. 307; *Scott v. Avery*, 8 Welsby, H. & G. 487; *Insurance Co. v. Creighton*, 51 Ga. 95; *U. S. v. Robeson*, 9 Pet. 319; *Lovejoy v. Insurance Co.*, 11 Ins. Law J. 186; Wood, Fire Ins. § 493; *Gasser v. Sun Fire Office*, 44 N. W. Rep. 252.

It is true that some courts have held that similar arbitration clauses, providing for the ascertainment of the amount of loss, were not binding; but we think it will be found that they so decided upon the ground that they were not made a condition precedent to bringing suit. Most of the cases cited by plaintiff's counsel are not in conflict with the rule above stated. In most all, the attempt was made to oust the court entirely of its jurisdiction; and in the case of *Stephenson v. Insurance Co.*, 54 Me. 70, the court very tersely states the rule as follows:

"While parties may impose, as a condition precedent

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to application to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law."

Plaintiff relies upon the case of *Nurney v. Insurance Co.*, 63 Mich. 633 (30 N. W. Rep. 350). That case is very different from this in one important feature, which was evidently the basis of the decision. The contract provided for arbitration at the written request of either party. Their negotiations for settlement covered a period of five months, and neither party claimed the right of arbitration. It was held to have been waived. Justice SHERWOOD (p. 637) said:

"In this case the agreement to arbitrate never became operative; and the agreement not to sue, being dependent on the agreement to arbitrate, of course must have become inoperative."

The policy in the present case provides that the amount of loss or damage *shall be* submitted to arbitration. The right to arbitrate is not made conditional upon a written request of either party. It expressly provides an unobjectionable and fair mode for ascertaining the amount if the parties are unable to agree, upon the ascertainment of which the plaintiff was entitled to bring suit. Interpreting the language in the *Nurney Case* in the light of the facts, we do not understand the Court to hold that an agreement to submit the ascertainment of unliquidated damages to arbitration, as a condition precedent to bringing suit, is not valid, or that either party thereto can revoke it at his own will. A waiver of arbitration necessarily implies a waiver of all the conditions dependent upon it, and leaves the parties in the same situation as they would be in if they had made no agreement to arbitrate. Such we understand to be the doctrine of that case. If it was intended to establish a different rule, we hereby expressly overrule it.

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2. The evidence for plaintiff showed that the lumber was all destroyed except about 19,000 feet. Counsel claim that this was, in effect, a total loss, and that therefore the arbitration clause does not apply. The terms "loss" and "damage," as used in the policy, are synonymous, and mean substantially the same thing. Both are included in the agreement to arbitrate, and it makes no difference whether the loss was total or partial. The language of the policy cannot be construed to limit the right of arbitration to a case where the property was damaged, but not destroyed. *Gasser v. Sun Fire Office*, 44 N. W. Rep. 252.

3. The mere silence of the defendant did not constitute a waiver. The defendant was in the position of a debtor; the plaintiff, of a creditor. A debtor waives no right by his silence when he is not called upon to act. The defendant, by letter, promptly informed plaintiff that it disputed the amount of its loss, and demanded an estimation under the contract. Even if this letter was not a demand for arbitration, it certainly constituted no waiver. If it was not, when was the waiver established by its silence? If plaintiff had commenced suit the day after receiving this letter, would it be contended that it had waived its right? In order to establish a waiver, the plaintiff should have moved upon the receipt of this letter, and fastened upon the defendant some acts or conduct from which a waiver might naturally be inferred. It is silence against silence, and neither party is placed thereby in any other or different position than that in which they stood at the beginning.

4. The measure of damages fixed by the parties in their contract was not to exceed the actual cost of producing the lumber destroyed. This was not the market or cash value. The court, therefore, adopted a standard of value in direct conflict with the agreement of the parties. On

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this point there can be no room for doubt. There is no difficulty in making the computation. If plaintiff bought the logs, the measure of damages would be the price paid, with interest from date of purchase, and cost of manufacture and storing. If it purchased the stumpage, the measure would be the price of the stumpage, with interest, and the other costs added. If it owned the lands from which the logs were cut, the measure would be the fair value of the stumpage, with the other costs added, and interest.

The judgment must be reversed, and a new trial ordered.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred.

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RICHARD G. PETERS AND THE R. G. PETERS SALT & LUMBER COMPANY v. ANTOINE E. CARTIER.

Recording laws—Quitclaim deed—Bona fide purchaser—Notice.

A grantee in a quitclaim deed is not a *bona fide* purchaser, and takes only the interest of his grantor. *Johnson v. Williams*, 37 Kan. 179, and cases there cited.

So *held*, where in recording a deed of wild lands the register omitted two descriptions, of which fact the grantee was ignorant, who soon after mortgaged *all* of the lands, which mortgage was duly recorded, after which a land speculator secured a quitclaim deed of the section containing the omitted lands, and quitclaimed one of the *omitted* descriptions to a lumberman, who had sufficient notice and knowledge to put him upon inquiry, which, if made, would have disclosed the real condition of the title, which inquiry he failed to make.

Appeal from Mason. (Judkins, J.) Argued January 24, 1890. Decided April 11, 1890.

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Bill to remove cloud from title, and for an injunction. Defendant appeals. Affirmed. The facts are stated in the opinion.

Dovel, Smith & Smurthwaite, for complainants, contended:

1. Under the facts in this case defendant is not a good-faith purchaser, within the meaning of How. Stat. § 5683.
2. Defendant's *actual* knowledge of the Peters mortgages was sufficient to put him upon inquiry; citing *Clark v. Holland*, 72 Iowa, 34; and see, as to the record of a mortgage being constructive notice, *Alderson v. Ames*, 6 Md. 52, cited with approval in *Edwards v. McKernan*, 55 Mich. 528.
3. How. Stat. § 5653, providing that a quitclaim deed shall be sufficient to pass all the estate which the grantor could *lawfully* convey by a deed of bargain and sale, was not intended to place the grantee on an equal footing with the purchaser under a warranty deed, which declares the good faith of the grantor to the amount of the money invested.
4. The United States courts, and the courts of most of the states, hold that a grantee under a quitclaim deed is chargeable with notice of an outstanding title; citing *Dickerson v. Colgrove*, 100 U. S. 578; *Baker v. Humphrey*, 101 Id. 494; *Hastings v. Nissen*, 31 Fed. Rep. 597; *Postel v. Palmer*, 71 Iowa, 157; *Schradski v. Albright*, 98 Mo. 42; *Martin v. Morris*, 62 Wis. 418; *Johnson v. Williams*, 37 Kan. 179; *Marshall v. Roberts*, 18 Minn. 405.
5. But, aside from the force of his deed, the facts show that defendant had both actual and constructive notice of complainants' title, and of sufficient facts to put him on inquiry; citing, on the question of notice, *Converse v. Blumrich*, 14 Mich. 120; *Stetson v. Cook*, 39 Id. 754; *Ins. Co. v. Conant*, 40 Id. 537; *Railroad Co. v. Davison*, 65 Id. 447; *Schweiss v. Woodruff*, 73 Id. 473; *Oliver v. Sanborn*, 60 Id. 346.

J. B. McMahon, for defendant, contended:

1. As to the distinction between the effect of actual notice of an unrecorded and recorded deed, counsel cited *Barnard v. Campau*, 29 Mich. 162; *Shotwell v. Harrison*, 30 Id. 180.
2. A purchaser is not bound by any thing put upon record by parties outside of the chain of title through which he claims, and a party tracing the title from Douville back to the government would find nothing to guide him to mortgages by Peters or

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other strangers to the record title; citing How. Stat. § 5683; 3 Wash. Real Prop. (4th ed.) 317; *Losey v. Simpson*, 11 N. J. Eq. 246; *Embury v. Conner*, 2 Sandf. 98; *Edwards v. McKernan*, 55 Mich. 527.

GRANT, J. On May 26, 1883, one William G. Hinman, being the owner in fee of the land in dispute, and other lands, sold and conveyed them by warranty deed to complainant Richard G. Peters. The consideration was $20,000. The whole number of acres conveyed was 1,160. They were situated in sections 26, 27, 28, 33, 34, 35, and 36, township 20 N., range 15 W., and section 3, township 19 N., range 15 W., Mason county. They comprised all the lands he owned in that vicinity, and were known among lumbermen as the "Pierce & Hinman Lands." June 1, 1883, the deed was recorded in the office of the register of deeds for Mason county. By the neglect or oversight of the register, the N. ½ of the N. E. ¼, and the S. W. ¼ of the S. E. ¼, of section 34, were omitted from the record.

May 30, 1883, Peters executed a mortgage upon all the lands described in the Hinman deed, and other lands also, for $50,000. This mortgage was recorded June 1, 1883, and the record contained a description of the land here in controversy. This mortgage contained some defects, not material to the issue in this case; and December 24, 1883, Peters and his wife executed another mortgage to correct them. This mortgage covered the same lands as the first, and was recorded January 4, 1884. After the purchase from Hinman the lands were assessed to Peters, and the taxes paid by him and his co-complainant.

Douville knew of the sale to Peters. He was a land speculator. Having learned from the record the condition of the title as it there appeared, he wrote to Hinman, who lived in Pontiac, a letter, dated September 8

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1885, offering him $10 for a quitclaim deed of the whole of section 24, township 20 N., range 15 W. The letter contained this statement:

"It is probably worth nothing to you, and I do not know as it will be worth anything to me."

Hinman wrote accepting the offer. Douville thereupon, on September 15, sent him a draft for $10, and a deed for section 34 instead of 24. Hinman testifies that he signed the deed supposing that it was for section 24, and he assigns a good and honest reason for executing such a deed for the latter section. This deed was recorded September 22, 1885.

September 28, 1887, Douville conveyed to Cartier, by quitclaim deed, the S. W. ¼ of S. E. ¼ of section 34; the consideration being $2,500. Before the deed to Cartier was made, Douville procured an abstract of the title, and delivered it to him. This showed the two mortgages above mentioned, and the quitclaim deed to Douville with a consideration of $1. Peters and Douville lived in Manistee; Cartier, in Ludington. Douville employed one Stronach to sell the land for him, offering him $200 to make a sale. Cartier had previously requested Stronach to be on the lookout for pine lands for him. Stronach informed Cartier of this land, and Douville's offer to sell for $2,500. Stronach was a careful timber estimator. He examined the land at the request of Cartier, and reported to him that there were 650,000 of pine timber, worth $6 per 1,000. When Stronach offered the land to Cartier, Cartier replied: "Isn't that the forty that Mr. Peters has a claim on?" Cartier had lived upwards of 30 years in Manistee and Ludington; was well acquainted with Peters; could communicate with him at any time by telephone; kept himself posted, to know where the pine in that region was, and who owned it; went to Manistee to see Douville about the purchase. He further testifies

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that his neighbors knew, substantially, what pine he owned, and he knew what pine his neighbors owned. He knew that Douville's title rested upon a quitclaim deed, with only a nominal consideration. Douville refused to warrant his title.

Complainants did not know of the mistake in the record until after the deed to Cartier. Immediately upon learning this fact, they filed the bill to remove the cloud from their title. Decree was rendered in favor of complainants. Cartier alone appeals. Cartier's son, evidently mistrusting the validity of Douville's title, asked his father, prior to the purchase, if he thought Douville was the owner of the land. The above are the essential facts to be gathered from the record.

1. Peters was the owner in fee of this land, and can only be divested of his title by a *bona fide* purchaser without notice of such facts as were sufficient to put a prudent man upon inquiry. Hinman had no title to convey to Douville. Douville knew that Peters had purchased, and that the deed to him was worthless. The execution of the two mortgages—one only a few days after the purchase by Peters, which purchase was known to Cartier—was an assertion of title in the mortgagor. Cartier had actual knowledge of these mortgages, and this alone should have been sufficient in morals, if not in law, to have caused him to investigate the title. But, aside from this, he evidently understood that this land was included in the Peters purchase. It was therefore his duty to inquire into Peters' rights before purchasing. He could have communicated with Peters personally, or by letter or telephone, in a few hours. The conclusion is irresistible that he feared the result of an investigation into the title, and preferred to take his chances of being held to be a *bona fide* purchaser, without investigation. His grantor refused to give him any but a quitclaim deed,

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thereby exhibiting a lack of confidence in his title. All the indications surrounding the transaction would, if followed, have speedily led him to the truth. He blindly declined to pursue them. He was not, therefore, a *bona fide* purchaser. The recording laws were never intended as a shield to such transactions.

2. Under the cloak of quitclaim deeds, schemers and speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual methods of conveying a good title—one in which the grantor has confidence—is by warranty deed. The usual method of conveying a doubtful title is by quitclaim deed. The rule is wise and wholesome which holds that those who take by quitclaim deed are not *bona fide* purchasers, and take only the interest which their grantors had. This rule is adopted in the United States Supreme Court, and in the courts of many of the states. *Johnson v. Williams*, 37 Kan. 179, and cases there cited. It is, therefore, immaterial whether Cartier had notice or knowledge of complainants' title. He must be held to have purchased at his own risk; and Douville, having no title, conveyed none to him.

Decree is affirmed, with costs of both courts.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred.

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WILLIAM F. NEAR v. HENRY J. DONNELLY.

Contract—Stock subscription—Equitable lien.

Complainant and nine others agreed to pay to defendant the sums set opposite their respective names as and for stock in a hotel building, which he agreed to erect, they to take as payment an interest and ownership in the building equal to the amount so paid. Defendant agreed to keep an itemized account of the cost of the building, and to exhibit it to the stockholders, on its completion, to enable them to ascertain the proportionate interest of each therein. The stockholders further agreed that, if on such completion defendant would furnish the building in a proper manner for a hotel, he should have its use as long as he kept it as a hotel, by paying to them 7 per cent. interest on the amount of their several subscriptions, all of which defendant agreed to do. Defendant erected the building and furnished it, and opened a hotel, and most of the stockholders paid their subscriptions. Defendant kept an account of the expense of construction for a time, and then ceased doing so, and claims to have lost the figures so kept, but testifies that the building cost between $9,000 and $10,000. No account of the cost was ever rendered, and no stock company was ever formed or stock issued.

In construing the agreement the Court held:

a—That it was the intention of the parties that upon the completion of the building its entire cost would stand for the capital invested, which was to be represented by stock, and each subscriber should have his share of the stock in proportion to the sum invested by each, which stock should represent an interest in real estate, and the money be permanently invested so long as defendant continued to keep the hotel.

b—That equity will look upon that as done which the parties intended should have been done, and the Court will treat the stock subscribed as having been issued, and as representing an interest in the hotel building equal in extent to its proportion to the whole sum invested in the building.

c—That the intention was that the stock should not be assigned to outside parties, but, if it had been intended to be *absolutely* non-transferable, the defendant, by acquiescing in the assignments to complainant, and paying him interest thereon, has waived such condition.

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d—That the stock was secured by an equitable lien upon the real estate represented by it, and that payment of accrued interest is enforcible by a foreclosure in equity, but that payment of the principal of the subscriptions cannot be enforced so long as defendant keeps the hotel as such.

e—That, in order to ascertain the extent of the interest represented by the stock held by the owners of the stock subscriptions, there must be an accounting as to the cost of the building, and, as defendant has failed to keep an account of the same, proofs may be taken of what it was worth to build and complete it, and upon the coming in of the commissioner's report a decree of foreclosure may be entered subjecting that undivided interest in the hotel building, including the land covered by it, which is represented by the stock subscriptions *paid in*, to a sale to satisfy the interest due and unpaid, and the surplus, if any, to be paid over *pro rata* to the owners of the *paid up* subscriptions.

Appeal from Ingham. (Smith, J., presiding.) Argued January 24, 1890. Decided April 11, 1890.

Bill for an accounting, etc. Defendant appeals. Reversed, and decree entered in accordance with opinion, in which the facts are stated.

George F. Day (*Cahill & Ostrander*, of counsel), for complainant, contended:

1. The relation of debtor and creditor existed between the parties, and the demands of the several subscribers could be assigned to complainant; citing How. Stat. § 7344; *Cook v. Bell*, 18 Mich. 337; *Briggs v. Hannowald*, 35 Id. 474.
2. Every express executory written agreement whereby the parties sufficiently indicate an intention to make some particular property security for a debt or obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon such property; citing 3 Pom. Eq. Jur. § 1235; *Haverly v. Becker*, 4 Comstock, 169; and any written instrument intended as security for the payment of money advanced is in equity a mortgage; citing 3 Wait, Act. & Def. 145.
3. Equity will consider that done which ought to have been done, and treat the subject-matter, as to collateral consequences and incidents, as if the final acts of the parties had been executed

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exactly as they should have been; citing 1 Story, Eq. Jur. § 64*g*.

4. If complainant is entitled to the lien claimed, it should cover so much of the land as is commonly used with the hotel and as is appurtenant to it,—within the curtilage; citing 4 Wait, Act. & Def. 539; *Greenwood v. Murdock*, 9 Gray, 20; *Cheshire v. Shutesbury*, 7 Metc. 566; *Forbush v. Lombard*, 13 Id. 109.

Q. A. Smith, for defendant, contended:

1. All that defendant ever agreed to do was to build and keep the hotel, and pay the subscribers interest on their stock as long as they owned it, which stock was unassignable.
2. Defendant never agreed to pay any of the principal money, and therefore the theory of enforcing the arrangement as an equitable lien upon the property falls to the ground. Equitable liens cannot exist without a precedent agreement for security; citing 1 Jones, Mort. § 168; 1 Thomas, Mort. (2nd ed.) § 41.
3. A contract ought to be clear, explicit, and definite, and capable of complete enforcement and performance, and clearly and satisfactorily proven, before a court of equity can be invoked to carry it into effect; citing *Wilson v. Wilson*, 6 Mich. 9; *Brown v. Brown*, 47 Id. 378; *Eccard v. Brush*, 48 Id. 3; *Peckham v. Balch*, 49 Id. 179.
4. The only equitable relief complainant is entitled to, if any, is an accounting as to the cost of the building, and to have his interest therein apportioned and set apart to him.

CHAMPLIN, C. J. The complainant asks that an account be taken respecting the amount due to him under the instrument hereinafter set forth, and that his rights and equities in the hotel, and land upon which the same is built, may be ascertained and declared by the decree of the court, and that he may be decreed to have an interest in and a lien upon the hotel and land as security for the payment of the amount found due, together with the unpaid interest thereon, and that defendant be decreed to pay the same by a day fixed, and in default the usual decree for foreclosure and sale. Below is a copy of the agreement referred to:

"We, the undersigned, in consideration of the covenants and agreements hereinafter contained, agree by and

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with H. J. Donnelly to take stock to the amount set opposite to each of our names in a hotel building, as hereinafter described and located, on condition that the said Donnelly shall build on the north-west corner of Maple street and State road, in the village of Mason, Ingham county, a brick hotel three stories high, and of the following dimensions, viz.: 80 feet on Maple street, 60 feet on State road, 20 feet on east front between Maple street and State road, 29 feet on north side, and 60 feet on west end; the same to be inclosed by the first day of January, 1870, and finished as soon thereafter as can be conveniently done. We will pay to the said Donnelly, at the time and in the manner hereinafter designated, the sum set opposite our respective names as and for stock in said building, and will take in pay an interest and ownership in said building to the amount so paid, and on the further condition that said H. J. Donnelly shall keep a true and just account, properly itemized, of the cost and expense of building said hotel, that to the end that they may be enabled to ascertain the proportion of each in said building, and shall exhibit the same at completion of said building to them.

"And we further agree that, if on the completion of said building the said Donnelly will furnish the same in a proper manner for a hotel, he, the said Donnelly, may have the rent and use of said building so long as he will keep the same as a hotel, by paying to each of us interest upon the sum invested by us at 7 per cent. per annum, to commence from the time it is paid in. The same to be paid by us as follows, viz.: One-half when the basement walls of said hotel are complete, and the balance when the building is inclosed ready for use. And we agree to sell to said Donnelly our interest in the same at any time when he will pay us the amount invested, with accrued interest.

"Dated June 30, 1869.

NAMES.	
J. L. Isherwood	$ 500 00
William F. Near	500 00
G. G. Mead	200 00
J. L. Wheeler, in brick and labor	500 00
John E. Spencer	500 00
K. J. Wilson, to be paid in tin and sheet-iron work	50 00
E. Stanton	300 00
W. A. Teel	150 00

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A. O. Millspaugh	$100 00
E. A. Barnes	50 00
	$2,850 00

"And I, H. J. Donnelly, in consideration of the foregoing, agree to build said hotel as above described, and on its completion to furnish and keep the same as a hotel, and to pay to each of the men who take stock as above the sum of 7 per cent. per annum upon the amount invested by each at the time above mentioned, so long as they shall continue to own the same.

"June 30, 1869. H. J. DONNELLY."

The proofs show that Mr. Donnelly went on and built the hotel on the land, and had it so far completed that he opened it for business on February 22, 1870. They further show that all of the subscribers to the agreement paid their subscriptions, except the two last named, who have entirely failed to pay.

Afterwards, and on the days the instruments bear date, complainant, Near, purchased, at 70 cents on the dollar, and had assigned to him, the subscriptions, as follows:

"This indenture, made this 8th day of December, A. D. 1870, witnesseth that, for a valuable consideration to me in hand paid by William F. Near, I have sold, and hereby convey, sell, and set over, to him, his heirs and assigns, 10 shares of stock in the Donnelly House, situated in the village of Mason, county of Ingham, State of Michigan, same being my interest in said house, and said shares of stock were $50 each, making the sum of $500 actually paid and invested towards the erection of said house by me.

"In witness whereof I have hereunto set my hand the day and year above written. JEROME L. WHEELER.

"Witnessed by P. LOWE."

"This indenture, made and executed this 8th day of December, A. D. 1870, witnesseth that, in and for a valuable consideration to me in hand paid by William F. Near, I have sold, bargained, conveyed, and by these presents do hereby bargain, sell, convey, and set over, to him, said William F. Near, his heirs and assigns, four shares of stock in the Donnelly House, situated in the

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village of Mason, county of Ingham, State of Michigan, the same being my interest in said house, and shares of stock were $50 each, making a sum of $200 actually paid and invested towards the erection of said house by me.

"In witness whereof I have hereunto set my hand and seal the day hereinabove written.

"GEO. G. MEADE. [SEAL.]"

"This indenture witnesseth that, for a valuable consideration to me in hand paid by William F. Near, I have bargained, sold, and conveyed, and by these presents I do bargain, sell, and convey, to said William F. Near, his heirs and assigns, 6 shares of stock in the Donnelly House, situated in the village of Mason, the same being my interest in said house, and such shares are $50 each, making the sum of $300 actually paid and invested towards the erection of said house by me.

"In witness whereof I have hereunto set my hand and seal the 21st day of January, 1871.

"EDWIN STANTON."

"This indenture witnesseth that, for a valuable consideration to me in hand paid by William F. Near, I have sold, and hereby convey, sell, and set over, to him, ten shares of stock in the Donnelly House, situated in the village of Mason, Ingham county, Michigan, the same being my interest in said house, and such shares of stock given for $300 actually paid and invested towards the erection of said house by me.

"In witness whereof I have hereunto set my hand this 18th day of May, 1870.

"JOHN L. ISHERWOOD."

"MASON, June 15, 1872.

"For value received I hereby sell, assign, and convey to W. F. Near all my right, title, and interest in and about the property in Mason known as the 'Donnelly House,' and my stock in the same.

"Witness my hand the day above written.

"J. E. SPENCER. [Seal.]"

"MASON, June 15, 1872.

"Know all men by these, that I, J. E. Spencer, do sell my interest in the Donnelly House to W. F. Near.

"J. E. SPENCER."

Defendant paid complainant the interest down to April, 1886. He has not paid any since. He kept account of

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the cost of building for a time, but discontinued it before the building was completed, and says he has lost the figures he did keep for a time, but testifies that it cost between nine and ten thousand dollars. No account of the cost was ever rendered, and no stock was ever issued. No stock company was ever formed; the paper set out above being the only one ever signed by the parties.

We are asked to construe this contract so that Mr. Donnelly shall occupy the relation of a debtor to the subscribers to the amount of their subscriptions, and further to say that it was the agreement that the subscribers should have an equitable lien for the repayment to them of the amount of the subscriptions. We must ascertain the intention of the parties from the written instrument. The language is:

"We agree to take stock to the amount set opposite to each of our names in a hotel building."

"We will pay to the said Donnelly, at the time and in the manner hereinafter designated, the sum set opposite our respective names *as and for stock in said building*, and will take in pay an interest and ownership in said building to the amount so paid. * * * And we agree to sell to said Donnelly our interest in the same at any time when he will pay us the amount invested, with accrued interest."

"And I, H. J. Donnelly, agree * * * to pay to each of the men who take stock as above the sum of seven per cent. per annum upon the amount invested by each at the time above mentioned."

From these clauses in the contract, construed in connection with others, I think it clearly appears to have been the intention of the parties that upon the completion of the building its entire cost would stand for the capital invested, which was to be represented by stock, and each should have his share of the stock in proportion to the sum invested by each; that this stock should

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represent an interest in real estate, and the money was permanently invested so long as Donnelly should continue to keep the same as a hotel. This view is sustained by the language made use of in the assignments, made, some of them, before the building was completed and opened, and before any dispute had arisen. There are three of these which mention the shares as being $50, and the amount subscribed as stock.

Equity will look upon that as done which the parties intended should have been done. We must look upon the stock subscribed as having been issued, and as representing an interest in the hotel building equal in extent to its proportion to the whole sum invested in the building. Donnelly, in lieu of rent, agreed to pay each stockholder 7 per cent. interest on the amount of his stock so long as he kept the hotel, and—

"So long as they should continue to own the same."

It is claimed that this last clause renders the stock unassignable, or, at least, if assigned, Donnelly is no longer obliged to pay interest. I think the intention was that the stock should not be assigned to outside parties. The stock representing interest in the hotel building, it can readily be seen that Donnelly would object to third parties or strangers becoming owners of such interest, and he protected himself by this clause. The reasons do not apply to one stockholder buying the stock of another stockholder, and, if it did, it must be held that by recognizing the assignment for so long a time, and paying interest to Near without objection on that score, he waived that clause of his contract, if it was designed absolutely to prevent any transfer.

From the nature of the transaction, I think the stock was secured by an equitable lien upon the real estate represented by it, and that payment of the interest due and

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unpaid can be enforced by a foreclosure in equity. The face amount of the stock is not due, and Donnelly cannot be forced to pay such subscription so long as he keeps the hotel as such. Whether he can ever be compelled to repay the face of the subscriptions is not now before us, and we express no opinion upon it. In order to ascertain the extent of the interest represented by the stock held by the owners of the stock subscriptions, there must be an accounting as to the cost of the building, which has not been done. If Mr. Donnelly has failed to keep an itemized account, proofs may be taken of what it was worth to build and complete it; and upon the coming in of the commissioners' report a decree of foreclosure may be entered subjecting that undivided interest in the hotel building, including the land covered by it, which is represented by the stock subscriptions paid in, to a sale to satisfy the interest due and unpaid. The surplus, if any, will be paid over to the owners of the subscriptions paid in, *pro rata*.

The decree must be reversed, and a decree entered in accordance with this opinion, and the record remanded to the court below for further proceedings in pursuance of the decree. The defendant will recover his costs of this Court.

MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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JOHN B. CONLIN v. APPALONIA MASECAR.

Equity—Reformation of deed.

In order to ascertain whether a mistake has been made in describing property in a deed, it is essential to ascertain the *intent* of the parties—the one in selling, and the other in buying—as to the subject-matter of the sale; and if the deed fails to express *that* intent, there is a mistake which can be relieved against in equity.

So *held*, where the parcel of land offered for sale was fenced, and both parties were upon the ground and saw the inclosed land, which was described to the purchaser as two lots,—it having been so described in mortgages which the vendor had purchased, who had afterwards taken a deed containing a like description,—when in fact one-half of one of the lots was owned and *occupied* by an adjoining proprietor; and it is held that the mistake was mutual, and could be corrected in equity.

Appeal from Monroe. (Kinne, J.) Argued January 24, 1890. Decided April 11, 1890.

Bill to reform a deed. Defendant appeals. Affirmed. The facts are stated in the opinion.

George M. Landon, for complainant, contended:

1. The evidence must be clear, convincing, satisfactory; but the rule does not require that it shall not be conflicting.
2. Parol proof is admissible to show mistake, and the question is, does it satisfy the court? citing *Gillespie v. Moon*, 2 Johns. Ch. 585.
3. A deed may be reformed, not only where there is a mistake in the omission or insertion of words contrary to the intention of the parties, but also where they, understanding the language used in the description, believe it to correspond with the actual boundaries of the land intended to be conveyed, but are mistaken; citing *Bush v. Hicks*, 60 N. Y. 293.
4. In all cases of mutual mistake, however induced, or of the mistake of one and fraud of the other, courts will reform instru-

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ments; citing *Albany Savings Inst. v. Burdick*, 87 N. Y. 40; *DeRiemer v. Cantillon*, 4 Johns. Ch. 85.

5. As to the right of the complainant to file his bill, see *Johnson v. Taber*, 10 N. Y. 319.

I. G. Humphrey, for defendant, contended:

1. The bargain relied upon by complainant to reform, if any existed other than the deed, rests in parol, and is within the statute of frauds, and is void, not voidable, and cannot be enforced; citing How. Stat. § 6181.
2. Where it is necessary to make out a contract in writing, parol evidence is inadmissible to supply any defects in the writing; citing *Parkhurst v. Van Courtland*, 14 Johns. 15.
3. No fraud is alleged against the defendant, and the papers were made out according to the intention of the parties at the time. Therefore equity has no jurisdiction to reform the deed.
4. The alleged oral agreement was but a conversation between complainant's agent and defendant's husband, who denies being her agent, neither of whom had power to bind the principals, who could not have insisted on a specific performance; citing How Stat. §§ 6179, 6181, and cases cited.
5. The courts will never reform a deed, or annul and set aside deeds, on a claim that they do not conform to the contract of the parties, unless the evidence is clear and satisfactory, and establishes complainant's right beyond a reasonable doubt; citing *Church v. Logan*, 77 Iowa, 326.
6. It must not only appear that there was an error on both sides, but the mistake must be admitted or distinctly proved; citing *Ludington v. Ford*, 33 Mich. 123, and cases there cited.

CHAMPLIN, C. J. Complainant filed his bill in the circuit court for the county of Monroe, in chancery, to correct a mistake in, and reform, a deed executed by him to defendant, dated May 21, 1879, conveying to her—

"All that certain piece of land situate in the city of Monroe, county of Monroe, and State of Michigan, known and described as 'Lots Number Twenty-three and Twenty-four (23 and 24) of the Studiford Plat,' according to the recorded plat thereof, with the buildings thereon."

The deed contained covenants of seisin and against incumbrances, and a warranty to defend against all lawful claims. The bill also prayed a perpetual injunction

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restraining defendant from further prosecuting a suit at law which she had brought against him for breach of covenants in the deed, which was commenced February 6, 1887; and the bill in this case was filed April 4, 1887.

The alleged mistake is in the description of the premises, and consists in conveying the whole of lot 23, when it should have only conveyed the west half of lot 23, and the whole of lot 24. By the Studiford plat, lots 23 and 24 have each a frontage of 50 feet. In 1849, William P. Gale conveyed, by warranty deed, to Richard Stringleman, lot 24, and the west half of lot 23, Studiford plat, giving the boundaries and dimensions as 75x140 feet. This deed was duly recorded. Gale, November 14, 1862, conveyed to George Kronbach lot 22, and the east half of lot 23, bounded west by Stringleman, which deed was recorded November 18 of the same year. Stringleman and Kronbach entered into the possession and occupation of the premises deeded to them respectively. The premises conveyed to and occupied by Stringleman were fenced, which fences have occupied substantially the same position since. There were a house and barn and outbuilding upon the Stringleman premises.

Richard Stringleman died prior to 1872,—the exact date does not appear; and December 16, 1872, his widow and one heir joined in a mortgage upon the premises. This was released July 22, 1873. April 18, 1873, one of the heirs conveyed, by quitclaim deed, the premises to his mother, Elizabeth Stringleman. July 9, 1873, two other of the heirs executed a quitclaim deed to their mother, Elizabeth Stringleman, and therein described the premises as "Lots 23 and 24, Studiford's Plat." On the same day, Elizabeth Stringleman executed a mortgage to W. H. Lacey, describing the premises as "Lots 23 and 24;" and also, on the same day, she executed another mort-

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gage to Erastus H. Field, describing the premises mortgaged as "Lots 23 and 24."

Prior to 1878, John B. Conlin, the complainant in this suit, purchased the two mortgages last described, and took assignments thereof. Mrs. Stringleman also made another mortgage, covering in the description two full lots, which was afterwards discharged. On March 26, 1878, Elizabeth Stringleman conveyed to Conlin, by quitclaim deed, the premises, describing them in such deed as "Lots 23 and 24."

Mr. Conlin lived at White Pigeon, in St. Joseph county, and transacted his business at Monroe through his agent and attorney in fact, Edward R. Gilday. Neither Conlin nor Gilday had actual notice of the situation of the title, at this time, save what appeared from the description contained in the two mortgages executed on July 9, 1873, which Conlin had purchased. They had long known the premises occupied by the Stringleman family, embraced within the inclosure.

In the winter or spring of 1879, Mr. Gilday proposed to sell the premises to Dr. A. J. Masecar. Dr. Masecar had resided in Monroe but a short time, and had formed an intimate acquaintance with Mr. Gilday; and they, as well as their families, were on the most friendly terms. At the suggestion of Mr. Gilday, they went to view the premises. The doctor examined the premises,—went through the lower part of the house, and into the front and back part of the lot. Mr. Gilday told him the premises consisted of two lots. There is a serious conflict of testimony as to some things which are claimed by Mr. Gilday to have occurred upon that examination. Mr. Gilday testifies that the question arose as to the width of the premises, and that he, judging of the distance between the fences, said to the doctor that the lots could not be

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over 40-foot lots, as he did not think it was over 80 feet between the fences; that the doctor thereupon went to the fence at the south-east corner, and paced across the front of the lot; and that he asked the doctor how much he made it, and he shook his head, and said, "I don't think it is quite that much;" that he said to the doctor:

"I don't know whether it is that or not. I don't know the width of the lots here. They are so described in the papers, and that is all I know."

This part of Gilday's testimony is positively and distinctly denied by the doctor. I do not consider this disputed testimony of much importance. The doctor was then 40 years of age. He had had large experience in building houses,—could tell the dimensions of the house upon these premises; and it would seem, if that question was material to his purchase, that a man with such experience, and with such ability to give dimensions, would readily discern the difference between the frontage of 75 and of 100 feet. The price asked was $1,000. After viewing the premises, the doctor offered $900, which, after a time, was accepted. Mr. Gilday was about to prepare a deed, when the doctor told him to make the deed out in his wife's name, and gave him her name to insert in the deed. After it was drawn, it was sent to White Pigeon for execution, and on its return Mrs. Masecar executed her note and mortgage for a balance of the purchase money; the description in the mortgage following that of the deed, and describing the premises as lots 23 and 24. Mrs. Masecar and the doctor went into possession of the premises, and on November 13, 1883, executed a mortgage upon them to Mary Leonard, describing them as "Lots 23 and 24."

It appears that the two mortgages which Conlin had purchased, given by Mrs. Stringleman, had not been discharged of record; Mr. Gilday considering that they had

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merged in the deed from Mrs. Stringleman to Conlin. Dr. Masecar testifies that he found, upon investigation, that the mortgages had not been discharged, and also that somebody else had a deed to the east half of lot 23; that he then went to Mr. Gilday, and requested him to discharge those mortgages, and after some conversation he promised to discharge them; that he asked him at that time how it was that he had sold Mrs. Masecar two lots, when half of one of those lots was deeded to somebody else, and that he—

"Asked if he knew that lot was sold. He said he did. He said he sold Mrs. Masecar just exactly what Mr. Conlin's interest was in that property."

Mr. Gilday denies that part of this conversation relating to the title of the east half of lot 23. It appears by the record that Mr. Gilday discharged the two mortgages mentioned on November 6, 1883. At this time, according to Dr. Masecar's testimony, he knew that Mrs. Masecar had no title to the east half of lot 23; and yet it appears by the record that on November 13, or seven days later, she mortgaged both of the lots, regardless of want of title to the east half of 23, to Mary Leonard. The only importance this testimony has is its bearing upon complainant's delay to bring suit. Both Mr. Conlin and Mr. Gilday testify that they were not aware of the mistake until after the commencement of the suit at law. Mr. Humphrey testifies that he wrote a letter to Mr. Conlin notifying him of his want of title to the east half of lot 23. The testimony as to mailing the letter was not definite, but depended upon the ordinary usage and custom of mailing letters written by his firm. Mr. Conlin testifies he never received it. It is not necessary to recite the testimony at large.

Counsel for defendant claims that the parol testimony showing what Dr. Masecar said and did was incompetent,

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for the reason that he was not authorized in writing to act for his wife; that the deed is the only written evidence of the sale and purchase, and that cannot be reformed, unless in accordance with some preceding agreement in writing. I think, under the circumstances of this case, the testimony as to what preceded the writing of the deed was admissible. The doctor represented himself up to the time the deed was drawn, and then he directed his wife's name be inserted. She stepped into his shoes at that point, and is in no better position than he would be in had the deed run to him.

In order to determine whether a mistake has been made in describing the property sold, it is essential to ascertain the intent of the parties—the one in selling, and the other in buying—as to the subject-matter of the sale. If the deed expresses that intent, then there is no mistake which can be relieved from in equity.

The premises which the complainant, through his agent, Gilday, offered for sale, was a parcel of land inclosed by fences. The seller and the purchaser were upon the ground, and the purchaser saw all there was offered for sale. It was described to him as two lots. It would be idle, as well as preposterous, to claim that as the parties stood there, upon the ground, looking at the inclosure, the one intended to sell, or the other to buy, or thought he was buying, a strip 25 feet in width beyond the east fence, then in the occupation of Mr. Kronbach. It appears plainly to me that not only was there a mistake in the description of the property in the deed, but that the mistake was mutual. The defendant has got the identical premises she bought, and all she bargained for. The public records were constructive notice alike to both parties, that the legal title of the east half of lot 23 was in Kronbach. The mistake contained in the descriptions

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of the mortgages executed by Mrs. Stringleman in 1873 led Mr. Gilday to believe that the premises were correctly described as "Lots 23 and 24." This was such a mistake as entitles a party to relief in equity. I do not think that the fact that he did not search the record back, when he would have discovered the error, was such negligence as precludes relief, under the circumstances shown in the testimony.

The objection that parol testimony was not admissible to show the mistake is not well taken. The principles governing the introduction of parol evidence to reform written instruments are so well and fully stated in Pom. Eq. Jur. §§ 857–859, 864–867, that we need not incumber this opinion by stating them here.

We think the decree of the circuit court is right, and should be affirmed.

MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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WILSON C. EDSELL AND CHARLES W. EDSELL v. BARTLETT A. NEVINS.

Fraudulent conveyances—Execution—Equitable interest—Laches—Bill to quiet title—Possession.

Complainants took an assignment of a land contract as security for a loan, and at the request of the debtor, who was unable to meet his debt or the last payment on the contract, made such payment, and took a deed in their own names, and then contracted the land to the debtor's wife for the amount of their claims against the husband. During the life of the latter contract, the land was attached by a creditor of the husband, and afterwards levied upon, and

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notice of such levy filed, but no further steps were taken thereunder. Over two years after such attachment levy, complainants, with the consent of the wife, contracted the land to another party. The judgment creditor refused to release his levy, claiming that the husband had an attachable interest in the land, and that his surrender of his contract to complainants, and the execution of a new contract to his wife, was a mere device to defraud such creditor; whereupon complainants filed a bill to remove the cloud upon their title, which one of them testified was held as security for the debt due from the wife, to whom the surplus arising on the *last* sale was to be turned over. The vendee in the *last* contract was in possession, but without any stipulation in the contract therefor. In decreeing the relief prayed for, the Court hold—

a—That the right to enforce the lien, if it ever existed, has been lost by the failure of the judgment creditor to institute proceedings within one year to ascertain and determine the rights and equities of the judgment debtor; citing How. Stat. § 6108; *Grover v. Fox*, 36 Mich. 453; *Messmore v. Huggard*, 46 Id. 558; *Cranson v. Smith*, 47 Id. 189, 647.

b—The complainants were in a situation, in regard to the legal title and the possession, to maintain their bill [1]

Appeal from Allegan. (Arnold, J.) Submitted on briefs January 28, 1890. Decided April 11, 1890.

Bill to remove cloud from title. Defendant appeals. Affirmed. The facts are stated in the opinion.

W. B. Williams & Son, for complainants, contended:

1. It is claimed by the defendant that Cook owned an equitable interest in the land which was liable to execution under How. Stat. § 6108. The equities of redemption liable to levy and sale under this statute are *legal* equities, and not mere *equities*; citing *Gorham v. Arnold*, 22 Mich. 250; *Whiting v. Butler*, 29 Id. 129; *Rawdon v. Dodge*, 40 Id. 697; and a mere equity is not subject to execution; citing *Gorham v. Wing*, 10 Mich. 486, 492.
2. The most that is claimed by defendant's counsel is that Mrs. Cook held at the time of the levy as trustee for Mr. Cook, he having paid the consideration money. But if she did so hold,

[1] The bill was filed prior to the passage of Act No. 260, Laws of 1887, which permits the claimant of the legal or equitable title to lands, whether in possession or not, to file such a bill against a party *not* in possession.

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his equitable interest was not liable to levy and sale on execution; citing *Trask v. Green*, 9 Mich. 358; *Maynard v. Hoskins*, Id. 485; *Gorham v. Wing*, 10 Id. 486; *Gorham v. Arnold*, 22 Id. 250; *Harwood v, Underwood*, 28 Id. 427, 431; *Fairbairn v. Middlemiss*, 47 Id. 372.

3. If there was an attachable or leviable interest, defendant should have proceeded at once after levy to enforce the same by a bill in aid of execution; citing *Cranson v. Smith*, 47 Mich. 189, 647; *Messmore v. Huggard*, 46 Id. 558; and he should have moved during the life of the contract to Mrs. Cook; citing *Grover v. Fox*, 36 Mich. 453.

4. If Mr. Cook had any rights growing out of the transaction at the time of the levy, they could only be reached after the return of an execution *nulla bona*, and a bill filed in the nature of a creditor's bill, to which Mr. and Mrs. Cook were parties, as in that way only could Mrs. Cook's rights and interests be determined; citing *Smith v. Thompson*, Walk. Ch. 1; *Tyler v. Peatt*, 30 Mich. 63; *Fairbairn v. Middlemiss*, 47 Id. 372; *Cranson v. Smith*, Id. 189; *Vanderpool v. Notley*, 71 Id. 422.

5. The contract to Mrs. Hoag gave her no right to possession, therefore her possession was that of a tenant at will; citing *Dwight v. Cutler*, 3 Mich. 572; *Crane v. O'Reiley*, 8 Id. 312; and such possession is sufficient to give complainants a right to file their bill; citing *Blanchard v. Tyler*, 12 Mich. 339, 342; *Woods v. Monroe*, 17 Id. 238; *Holbrook v. Winson*, 23 Id. 394; and at time of decree the statute did not require possession, and does not now; citing Act No. 260, Laws of 1887; *Hatch v. St. Joseph*, 68 Mich. 220.

6. In this class of cases possession is not necessary, and the bill will lie under the general equity jurisdiction; citing *Pettit v. Shepherd*, 5 Paige, 501; *Jones v. Smith*, 22 Mich. 360, 365; *King v. Carpenter*, 37 Id. 363, 367; *Eaton v. Trowbridge*, 38 Id. 454; *Church v. Clark*, 41 Id. 730, 739.

Padgham & Padgham, for defendant, contended:

1. The evidence shows that C. L. Cook had an equitable interest in the land levied upon, which was subject to execution under How. Stat. § 6108; citing *Grover v. Fox*, 36 Mich. 453.

2. The bill cannot be maintained, because—

a—The complainants are not in possession, which is in Mrs. Hoag, under a contract of purchase, who is not a tenant, but has a subsisting leviable interest in the land; citing How. Stat. § 6108; *Fitzhugh v. Maxwell*, 34 Mich. 138.

b—The bill is filed to remove a cloud upon the title, and in such case the complainant must have a legal or equitable title

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to the land, and must have the actual possession; citing *Stockton v. Williams*, 1 Doug. 568.

c—The deed from Mower to complainants is held as security for the payment of Mrs. Cook's debt, as testified to by one of the complainants, hence is only a mortgage; citing *Johnson v. Van Velsor*, 43 Mich. 208; *Barber v. Milner*, Id. 248; *Hurst v. Beaver*, 50 Id. 612; *Ferris v. Wilcox*, 51 Id. 105.

CHAMPLIN, C. J. Bill of complaint is filed to remove a cloud from title.

In September, 1878, Calvin R. Mower was the owner of lots 65 and 66 Orleans street, and lot 69 Franklin street, in the village of Otsego, Mich. He entered into a written contract to sell said lots to Chauncey L. Cook for $400, payable in four equal annual payments, with interest. Cook built a house and barn upon the premises, and lived thereon as a homestead.

W. C. Edsell & son (complainants) were bankers at the village of Otsego, and on January 24, 1882, Cook effected a loan from them, and assigned to them his contract of purchase as security. Upon this security Cook borrowed money from time to time, and gave his notes therefor. In the summer of 1882, and before the last payment became due upon his contract, Cook informed complainants that he was unable to meet the last payment, and was also unable to pay his notes to complainants, and requested them to pay the balance on the contract to Mower, and take a deed of the premises in their own name, and then to contract the same to his wife, Eunice A. Cook, for the total amount which should be due from him. In accordance with this request, complainants, as they claim, on September 27 or 28, 1882, paid Mower, and received from him a warranty deed, bearing date September 21, 1882, and on September 28, as they claim, canceled the obligations they held against Cook, and made a contract in writing for the sale of the premises to Eunice A. Cook for the amount then due to complainants from Chauncey

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L. Cook, being $860, payable as follows: $300 on or before one year from date; $300 on or before two years from date; and $260 on or before three years from date,—with interest payable annually at the rate of 10 per cent. Mrs. Cook never paid the above sums, and Mr. and Mrs. Cook removed from the premises, and they were rented, and complainants collected the rent, and applied or indorsed the amounts collected upon the contract executed by Mrs. Cook.

On March 7, 1885, with Mrs. Cook's consent, complainants sold the premises to Mrs. Abigail E. Hoag for $1,400,—$500 to be paid April 7, 1885, and the balance on or before two years, with interest payable annually at 10 per cent.; which sum she is ready and willing to pay, as soon as complainants will give her a clear title. One of the complainants testifies that, although they hold the legal title to the property, they regarded it as security for the amount due them from Mrs. Cook, with interest, costs, and expenses, and when that is paid the balance they intend to turn over to Mrs. Cook.

Chauncey L. Cook, being indebted to defendant, Nevins, upon a note for $270, dated September 29, 1882, secured the same by chattel mortgage upon personal property, which security proved valueless; and on January 23, 1883, he commenced suit by attachment upon the note, and levied his attachment upon the land in question. He obtained a judgment, and levied an execution upon the premises attached on April 5, 1884, and recorded the same the same day in the register of deeds' office in Allegan county. Nothing has been done by defendant since to enforce the levy, and defendant refuses to release it.

Defendant claims that on January 26, 1883, Chauncey L. Cook had an attachable interest in said lands, and that his levy under his execution constitutes a valid lien

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upon such lands. He claims that the surrender by Chauncey L. Cook of his land contract to complainants, and the execution of a new contract to Cook's wife, was a mere device to defraud him, and hinder him in the collection of his debt against Chauncey L. Cook, and that he had the same interest in the land as he did before the contract to Mrs. Cook. If his claim be true, he has lost all right to enforce his lien by his laches. The statute (How. Stat. § 6108) permitting an execution to be levied upon equitable interests in lands, and in lands conveyed to defraud creditors, requires the judgment creditor to proceed within a year, and institute proceedings to ascertain and determine the rights and equities of the judgment debtor. *Grover v. Fox*, 36 Mich. 453; *Messmore v. Huggard*, 46 Id. 558 (9 N. W. Rep. 853); *Cranson v. Smith*, 47 Id. 191, 647 (10 N. W. Rep. 194, 11 Id. 186).

If we were to go into the merits of the case, we should feel inclined to hold that the property was at the time a homestead, so far as it came within the limitation as to quantity, and to that extent was not liable to be levied upon by creditors, but it is not necessary to enter into the discussion bearing upon the intent of abandonment.

We think the complainants were in a situation, in regard to the legal title and the possession, to maintain their bill, and the decree of the circuit court is affirmed.

MORSE, LONG, and GRANT, JJ., concurred.

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ALEXANDER A. SAENGER, EXECUTOR, ETC., v. HENRY VON DER HEIDE ET AL.

Mortgage—Indemnity for indorsement.

In this case an executor filed a bill for the foreclosure of a mortgage found in the testator's safe, and which the mortgagor claimed was given as indemnity for the indorsement of a note, which, after several renewals, was paid; and on an examination of the testimony the Court find in favor of the mortgagor's claim, and affirm the decree dismissing the bill.

Appeal from Wayne. (Reilly, J.) Argued January 29, 1890. Decided April 11, 1890.

Bill to foreclose a mortgage. Complainant appeals. Affirmed. The facts are stated in the opinion.

Henry M. Duffield, for complainant.

Alfred Russell and *Walter Barlow,* for defendants.

CHAMPLIN, C. J. The bill in this case is filed to foreclose a mortgage accompanied by a note for $8,000, dated September 18, 1871, due one year after date. The note was made by Henry Von der Heide, and was payable to the order of Bernard Stroh, without interest.

Bernard Stroh died in 1882, and complainant was appointed his executor, and entered upon the execution of his trust. Soon after his appointment he returned to the probate court an inventory of the estate, which was small, and did not include this note and mortgage. Several years after his attention was called to these securities by the sons of Bernard Stroh, whe took them from the safe used by Bernard Stroh in his life-time. His attention being called to them, he very properly advised with his

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attorney as to his duty in the premises. He presented the claim to Von der Heide, and he denied all liability thereon. He was further advised, and properly so, that his duty was to foreclose the mortgage. Accordingly he filed this bill. Henry Von der Heide admitted the making of the mortgage and note, but alleged that they were made and delivered to Bernard Stroh as security and indemnity to him for indorsing a note of $8,000 made by J. Flanigan and Von der Heide, and indorsed to the Detroit Savings Bank, of date September 8, 1871, which note, after several renewals, was finally paid and taken up in August, 1875. In reaching a conclusion, I have entirely excluded the testimony of Henry Von der Heide as being incompetent under the statutes.

Testimony was ample showing the making of the note of $8,000 to the Detroit Savings Bank, upon which Bernard Stroh was security, and that it was for the benefit of Von der Heide, who had at that time engaged with Mr. Flanigan in the cigar-box manufactory business, and that this sum of $8,000 borrowed from the bank was used as capital in such business. There is also testimony tending to show that Von der Heide secured Stroh for such indorsement. The testimony shows, also, that the note to the bank was paid in 1875. Complainant introduced testimony tending to show that during all this time Bernard Stroh was in great financial distress and embarrassments, harassed with suits, and judgments were recovered against him for large amounts. It is singular and significant, under the circumstances, that in the first place Stroh should have had any money to loan, at least so large a sum as $8,000, and in the second place that he should never have called upon the maker of the note for payment, but permitted it to outlaw in his hands long before he died. The mortgage had not been recorded when the executor first became possessed of it. I am

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satisfied fully, from the testimony and circumstances shown by the testimony, that the note and mortgage were held by Stroh under the circumstances set up in the answer, and that the bill of complaint was properly dismissed by the circuit court. The decree of the court below must be affirmed, with costs.

MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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MARY LAUGHLIN v. THE STREET RAILWAY COMPANY OF GRAND RAPIDS.

[See 62 Mich. 220.]

Practice in circuit court—Reading report of case to jury—Evidence —Expressions of pain.

1. The reading by counsel for plaintiff of the former opinion in this case, accompanied with a statement that the Court had passed upon the question of contributory negligence favorably to plaintiff, is held to have been highly improper.
2. It is not competent, in a negligence case, to prove what expressions of pain were made by the plaintiff more than four years after the accident, and after the suit was commenced, and when it was expected to come on for trial.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued January 30, 1890. Decided April 11, 1890.

Negligence case. Defendant brings error. Reversed. The facts are stated in the former opinion, in 62 Mich. 220.

Montgomery & Bundy (*James H. Hoyt*, of counsel), for appellant.

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Mitchel & McGarry and *Peter Doran*, for plaintiff.

GRANT, J. This case has before been in this Court, and is reported in 62 Mich. 220. It is unnecessary to restate the case or the facts here, as they are the same in both records, or to discuss the general principles involved. They are discussed and decided in the former opinion of the Court.

Counsel for plaintiff was permitted by the court to read to the jury the decision of this Court in the same case, upon the subject of contributory negligence. He accompanied his reading with the following statement:

"Here is the opinion of the Supreme Court upon a question of fact, whether this party was guilty of negligence or not, and what I propose to show is that the Supreme Court of the great State of Michigan, upon the facts appearing upon the other trial, said that the testimony of the plaintiff all tended to show at least ordinary care, and that was all the law required; and that the very arguments my brother has made in this case is asking that the jury find what the Supreme Court said did not exist."

These remarks of counsel, and the reading of the opinion to the jury, were highly improper. Such practice is very reprehensible. Fair and impartial verdicts cannot be obtained when such means are resorted to for the purpose of influencing the jury.

Mary Conklin, a witness for plaintiff, was asked what expressions of pain were made by plaintiff more than four years after the accident. This was after the suit was commenced, and about the time it was expected to come on for trial. Under these circumstances, proof of such expressions was incompetent, and the court should have rejected the testimony. In reply, the witness did not testify to any expressions of pain, but only described her appearance and condition. The error, therefore, was

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not prejudicial, but, in view of a new trial, we decide the question raised.

The other points raised upon the record are disposed of by the former opinion of this Court.

The record in this case embraces 828 pages. We think that this was entirely unnecessary. One hundred pages would have been sufficient to have presented all the questions which were not disposed of upon the former hearing. The defendant will therefore be allowed to tax costs for printing 100 pages only.

Judgment must be reversed, and a new trial ordered.

CHAMPLIN, C. J., and MORSE, J., concurred. LONG, J., did not sit.

NELLIE E. PORTER v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Negligence—Railroad companies—Alighting from moving train.

A railway company was in the habit of receiving and carrying passengers to and from the crossing of another road, without erecting a platform or station-house, but allowed passengers to board and leave trains at the statutory stopping place, 400 feet from the crossing. A passenger who had been accustomed to leave the train at *this* point heard the whistle for the crossing, and went to the car door, and as the train slowed up went out upon the platform to be ready to alight when it stopped, stepping down upon the lower step for that purpose. By reason of the turning of an air-cock the engineer was unable to control his train with the air-brakes, which had worked perfectly at other stopping places. He whistled for hand-brakes, which signal was promptly responded to, but without stopping the train. The passenger, when the train was about 166 feet from the crossing, jumped from the step, and was injured by the moving train. In a suit to recover the damages sustained it

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was claimed that the company negligently failed to stop the train at the usual stopping place; that its servants furnished the plaintiff no assistance in alighting; and that defendant negligently started the train, with sudden violence, while plaintiff was attempting to alight. In passing upon these claims the following propositions are stated by the Court:

a—No negligence is shown by the fact that the train ran past the usual stopping place. The train was equipped with the usual air brakes required by law. They were in good condition when the train started out. The turning of the air-cock was the sole cause of the inability of the engineer to control the train. How it became turned is wholly unexplained. The mere fact that it was turned is not of itself evidence of negligence. If it was turned by an accident which ordinary prudence could not have foreseen and prevented, or if it was designedly turned by some one not in defendant's employ, the defendant cannot be held liable. The burden of proof was upon the plaintiff to show that it was turned through the negligence of the defendant. This she has failed to do.

b—All the trainmen were at the time at their posts of duty, attempting to stop the train, in obedience to the requirements of law The station had not been announced, nor had the train stopped. The plaintiff had not been invited to alight. It is fair to presume that, if the trainmen had been near her, they would have prevented her from alighting, instead of assisting her to alight. It would certainly have been their duty to use all proper means for that purpose while the train was in motion. Under these circumstances, this allegation of negligence falls.

c—There is some evidence tending to show that the train, after it had slowed down, suddenly started up. But one cannot read the record without being convinced that the train gradually slowed down, till it came to a full stop when across the track of the other road. Be that as it may, the record fails to show that the sudden starting of the train had anything to do with the accident to plaintiff. No witness testifies that it started up when she was in the act of alighting. Her own testimony is conclusive that it had not. Under the record, there was no proof of negligence, and the circuit judge should have so instructed the jury.

Error to Kent. (Grove, J.) Argued January 30, 1890. Decided April 11, 1890.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

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Smith, Nims, Hoyt & Erwin (*M. J. Smiley*, of counsel), for appellant.

Montgomery & Bundy and *George P. Wanty*, for plaintiff, contended:

1. The practice of defendant's trainmen other than those upon the train in question in this suit was material and very important, showing, as it did, that while the defendant company was accustomed to receive fare for transporting passengers from Grand Rapids to the Lake Shore crossing, and had established that as a station, having no platform or depot to accommodate passengers in alighting from or boarding trains, the defendant had yet required of the public that they should get out upon the platform or steps of the car as it approached the stopping place, and before the train came to a halt. This had a very important bearing upon the plaintiff's conduct, as well as upon the duty of the defendant to her. It shows that up to the very moment that she alighted from the train she was acting in precise accordance with the instructions, directions, and requirements of defendant's servants; and it certainly does not seem to be any answer to this to attempt to say that the particular servants in charge of this train were not the ones who had imposed the requirements upon her; citing *Hunn v. Railroad Co.*, 78 Mich. 513, 526; 2 Greenlf. Ev. § 252.
2. It was the statutory duty of the defendant to bring the train to a stop before crossing the track of the L. S. & M. S. Ry; citing How. Stat. § 3376; Act No. 174, Laws of 1883, § 14, Art. 4; and the neglect to observe a statutory duty is negligence; citing *Klanowski v. Railway Co.*, 57 Mich. 525; and, independent of this statutory duty, the defendant owed the duty to the plaintiff of bringing the train to a stop and affording her an opportunity to alight; citing Bishop, Non-cont. § 1100; and if by a failure to do so the plaintiff, in acting under the directions of the servants of the company previously given, was placed in a position where, in the exercise of common prudence, she was justified in making the attempt to alight, and through a sudden increase of the speed of the train was injured, this was entirely the fault of the defendant; and it can make no difference that various of the servants of the company performed different and independent acts in inducing this result; citing *Shannon v. Railroad Co.*, 78 Me. 52.
3. The undisputed evidence showed that when the Lake Shore crossing was reached the brakes were not in working order; that the cock had been turned in the middle of the train; but there was no evidence to show when this was done, and no

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showing that any reasonable opportunity was afforded any one to turn the cock after leaving Grand Rapids. The testimony of defendant's witnesses was far from satisfactory, and certainly the jury were justified in finding that the train started out in this crippled condition, and this was certainly negligent; citing *Parsons v. Railroad Co.*, 113 N. Y. 355.

4. It was also a question for the jury as to whether the defendant was not guilty of negligence in failing to afford plaintiff assistance in alighting; citing *Allender v. Railroad Co.*, 43 Iowa, 276; and stopping the train or slackening the speed in such a manner that passengers cannot safely get on or off is an act of negligence; citing *Curtis v. Railroad Co.*, 27 Wis. 158; *Butcher v. Railroad Co.*, 98 N. Y. 128.

GRANT, J. Plaintiff recovered judgment in the court below for injuries sustained while jumping from a moving train on the defendant's road.

She purchased a ticket, August 7, 1888, and took the train from Grand Rapids to a place known as the "Lake Shore Crossing," near which she resided. At this point the defendant's track crossed that of the Lake Shore & Michigan Southern. The defendant was in the habit of receiving and carrying passengers to and from this crossing, but had not erected any platform or station-house. Its trains were required to stop 400 feet from the crossing, when passengers were allowed to leave and board trains. The fare was 10 cents, which plaintiff had paid. On nearing the station, the engineer of the train, which was a fast express, and running from 45 to 50 miles per hour, whistled at the usual and proper distance, and applied the air-brakes. These brakes failed to respond, and he immediately whistled for hand-brakes. The train hands, including the conductor, brakeman, and baggageman, immediately proceeded to set them. The engineer, upon passing the half-mile board and seeing that the train was not under control, again whistled for brakes, and reversed his engine. He did not succeed in stopping the train before reaching the crossing. The air-brakes were properly tested

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before leaving Grand Rapids, and were found to be in good order. They also worked perfectly at other stopping places. They failed to work at the crossing because, in some way entirely unexplained, the air-cock between the second and third cars had been turned, shutting off the air. This made it impossible to stop the train at the usual place.

Plaintiff had been to the city upon a visit, and was returning home. She heard the whistle for the crossing. As the train commenced to slow up, she arose from her seat, and went to the door. As the train approached the usual stopping place, she saw that it was going too rapidly for her to alight. As it gradually grew slower, she went out on the platform, to be ready to alight when it stopped. She then stepped down upon the lower step. When 166 feet from the crossing, with a small valise and umbrella in one hand, holding on to the rail with the other, and facing towards the engine, she jumped from the step to the ground,—a distance of about two feet. She fell, and in some way her feet were struck by some portion of the train, and seriously injured. She testified that the speed of the train had gradually slackened; that, at the time she jumped, it was running very slowly, having the appearance of just coming to a halt; that she then attempted to alight because it seemed to her to be her only opportunity for doing so. She stood on the front steps of the third car from the rear, next to the smoker. She does not testify how her feet happened to come in contact with the moving train; for, upon falling, she says, she momentarily lost consciousness, but recovered it again before the train had passed.

One witness stood on the steps between the smoker and the baggage-car, and, knowing that something unusual had happened, as the train had passed the usual stopping

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place, was leaning outwards, and looking to the rear. He saw plaintiff jump, with her valise and umbrella in her hand. He says that when she struck she wheeled around, and her feet struck the hind truck as they went by. This is the only testimony as to the manner of the injury, and is undoubtedly correct. The trucks did not pass over her feet; for her toes were not cut to pieces, crushed, or jammed. Some of the bones between the toes and ankle of the right foot were broken, and the flesh badly torn. The left foot was badly contused, but no bones were broken. Witnesses vary in their estimates of the speed of the train, from 2 to 15 miles per hour. It is apparent, from the manner in which the accident occurred after plaintiff jumped, and the injury inflicted, that the speed of the train was considerable. Plaintiff was 23 years old, a graduate of the Normal School, a school-teacher, accustomed to travel, and had repeatedly traveled over this part of the defendant's road.

Three grounds of negligence are alleged:

1. The defendant negligently failed to bring its train to a full stop at the usual place.
2. The defendant's servants furnished plaintiff no assistance in alighting from the train.
3. The defendant negligently started the train up, with sudden violence, while plaintiff was attempting to alight.

These are all combined in each count of the declaration, and together were undoubtedly intended to constitute the negligence against the defendant. We will, however, consider them separately.

1. No negligence is shown by the fact that the train ran past the usual stopping place. The train was equipped with the usual air-brakes required by law. They were in good condition when the train started out. The turning of the air-cock was the sole cause of the inability of the engineer to control the train. How it

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became turned is wholly unexplained. The mere fact that it was turned is not of itself evidence of negligence. If it was turned by an accident which ordinary prudence could not have foreseen and prevented, or if it was designedly turned by some one not in defendant's employ, the defendant cannot be held liable. The burden of proof was upon the plaintiff to show that it was turned through the negligence of the defendant. This she has failed to do.

2. All the trainmen were at the time at their posts of duty, attempting to stop the train, in obedience to the requirements of law. The station had not been announced, nor had the train stopped. The plaintiff had not been invited to alight. It is fair to presume that, if the trainmen had been near her, they would have prevented her alighting, instead of assisting her to alight. It would certainly have been their duty to use all proper means for that purpose while the train was in motion. Under these circumstances, this allegation of negligence falls.

3. There is some evidence tending to show that the train, after it had slowed down, suddenly started up. But one cannot read the record without being convinced that the train gradually slowed down, till it came to a full stop when across the track of the other road. Be that as it may, the record fails to show that the sudden starting of the train had anything to do with the accident to plaintiff. No witness testifies that it started up when she was in the act of alighting. Her own testimony is conclusive that it had not. Under the record, there was no proof of negligence, and the circuit judge should have so instructed the jury. We express no opinion upon the question of contributory negligence.

Judgment reversed, and new trial ordered.

CHAMPLIN, C. J., and MORSE, J., concurred. LONG, J., did not sit.

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MARY C. LEONARD v. CHARLES BEAUDRY ET AL.

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[See 68 Mich. 312.]

Contract for furnishing saw-mill with logs—Breach—Measure of damages.

1. The *law* of this case was settled in the former opinion, reported in 68 Mich. 312.
2. Testimony which enables a jury to fix the daily capacity of a saw-mill, or the number of days required to perform a sawing contract, and the daily expenses incurred in operating the mill while engaged in such performance, affords them sufficient *data* from which to ascertain the difference between the cost of performance and the contract price, without entering the field of conjecture or speculation.

Error to Muskegon. (Dickerman, J.) Argued January 30, 1890. Decided April 11, 1890.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion, and in 68 Mich. 312.

Bunker & Carpenter, for appellants, contended:

1. Profits have been rejected as a proper measure of damages on records much more clear and convincing than the one in this case; citing *McKinnon v. McEwan,* 48 Mich. 106; *Allis v. McLean,* Id. 428; *Petrie v. Lane,* 58 Id. 527, 67 Id. 454.

Smith, Nims, Hoyt & Erwin, for plaintiff.

CHAMPLIN, C. J. The law of this case was settled in 68 Mich. 312.

The testimony as to whether or not a contract was entered into between the parties, such as declared on in the declaration, was conflicting and directly antagonistic. This testimony was submitted to the jury under proper instructions, and they have found in favor of the plaint-

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iff. Their action does not come before us for review, if there was any testimony to support their verdict. The record discloses that there was such testimony. We have examined the errors assigned upon the rulings of the court in the admission of testimony, and find such rulings are free from error.

The only error assigned which requires comment is that which is based upon the right to recover damages under the testimony in the case.

When the case was here before, we said:

"When a claim is made for damages arising from breach of contract, and evidence is offered to show loss of profits which might have been realized from a performance of the contract, the question to be determined is whether the damages claimed are too conjectural, speculative, or contingent to form a safe basis for estimating the damages;" and we there said that, in a case like this, "there is no reason why the difference between the cost of performance and compensation agreed upon should not be recovered as actual damages suffered by the aggrieved party."

Defendants' counsel claim that the testimony is insufficient to form any just basis for the jury to estimate the plaintiff's damages. The jury having found for the plaintiff, they must have found that a contract was entered into as claimed by the plaintiff. Briefly stated, it was an agreement that the defendants would furnish to the plaintiff, to be sawed upon a band-saw at her mill, 1,000,000 feet of pine saw-logs of large size, and to commence the delivery of such logs at the mill as soon as the plaintiff was ready to saw them, which was about the 10th or 15th of May, and all to be delivered in the last part of June or the first part of July; for which sawing the defendants agreed to pay the plaintiff $3 a thousand feet for merchantable and short lumber, and $2 a thousand feet for culls. The testimony showed that about 10 per cent. of such logs would run to culls. Had she

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been furnished the logs so that she could have performed her contract, she would have been entitled to receive for sawing 100,000 feet of culls, at $2 per thousand, $200; and for sawing 900,000 feet of merchantable and short lumber at $3 per thousand, $2,700,—total, $2,900.

There was testimony as to the capacity of the mill for sawing lumber, varying from twenty to forty thousand feet per day, depending upon the size of the logs; but the most of the witnesses placed the capacity from twenty-five to thirty thousand feet. There was testimony tending so show that it would have taken from four to six weeks to saw the million feet contracted for. We have no way of ascertaining what number of days the jury agreed upon as the time it would have taken to do the sawing; but the testimony furnished them *data* from which they could fix the number of days with reasonable certainty. The testimony also tended to show that the daily expenses of operating the mill in performing the work contracted for was $65. We think there was testimony upon which the jury could safely and justly estimate the damage without entering the field of speculation and conjecture. When they fixed from the testimony the daily capacity of the mill, or the number of days required to perform the work, they could readily ascertain the difference between the cost of performance and the contract price therefor.

There is no error of law in the record, and the judgment must be affirmed.

MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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EDWARD STEWART v. THE CINCINNATI, WABASH & MICHIGAN RAILWAY COMPANY.

Negligence—Defective farm crossing—Liability of railroad company.

If a person erects insufficient or dangerous structures upon his own lands, personally or by contract, and third persons are injured, he will be liable for failing to observe the duty to keep his premises safe, and in such condition as not to cause injury to others lawfully thereon.

So *held*, where, pursuant to an agreement made with a land-owner at the time of the execution by him of a deed of right of way to a railroad company, the company constructed a farm crossing, with bridges over ditches it had cut on each side of its road-bed, to enable the land-owner to reach his land, and after the sale of the land an employé of the new owner, while hauling wood across one of the bridges, was injured by its giving way, the sills being defective; and it is held that the bridge was a structure built upon the railroad company's land, and, by its nature and use, was a continual invitation to those having a lawful right to cross from one side to the other to enter upon it, and cross there, and as long as this invitation, thus impliedly given to such persons, continued, it was the duty of the company, independently of any contract, to see to it that the bridge was safe for the purposes implied by the invitation.

Error to Berrien. (O'Hara, J.) Argued January 29, 1890. Decided April 11, 1890.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Edward L. Hamilton and *O. W. Coolidge*, for appellant.

L. C. Fyfe, C. E. Cowgill, and *George S. Clapp*, for defendant.

[The points of counsel are stated in the opinion.—REPORTER.]

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CHAMPLIN, C. J. On May 5, 1888, the plaintiff was injured while hauling with a team a load of wood over a bridge on a farm crossing which crosses defendant's railway. In constructing the railroad, ditches had been cut on each side of the railroad bed, from 10 to 14 feet in width; and, in constructing the farm crossing, bridges had been built across these ditches. The bridges were from four to five feet above the bottom of the ditches.

On September 30, 1881, Azariah Q. Kent was the owner of the farm known later as the "Green Farm," which consisted of about 200 acres of land, situated on both sides of the section line running east and west between sections 5 and 8, upon which section line was a highway, and the only one accessible from the land. Eighty acres lay south of this highway, used as a wood lot.

The Elkhart, Niles & Lake Michigan Railroad Company had surveyed a route for its railroad across this 80-acre lot, a few rods south of the highway, and running nearly parallel thereto. On September 30, 1881, Kent, by his attorney in fact, Asher Warner, in consideration of $100, as expressed in the deed, conveyed to the Elkhart, Niles & Lake Michigan Railroad Company a right of way 66 feet wide across the 80-acre lot, including the right to take therefrom material for the construction and repair of said railroad, and the right to conduct water by aqueducts, and the right to make proper drains.

On the same day the railroad company gave to Warner the following agreement, viz.:

"NILES, MICH., Sept. 30, 1881.

"Whereas, Asher Warner has this day sold and conveyed to the Elkhart, Niles & Lake Michigan Railroad Company, the right of way, and for other purposes, 66 feet in width, across the west half of the north-west quarter

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of section eight, in township eight south, range sixteen west, in Milton township, Cass county, Michigan:

"Now therefore, the said railroad company hereby agrees that the timber now standing on said right of way shall be laid off the railroad bed, and onto the adjoining land of said Warner, on either side of said railroad bed, as may be most convenient for the company, and agrees, further, to provide for said Warner a suitable crossing over their said road-bed onto his land.

"THE ELKART, NILES & LAKE MICHIGAN RAILROAD
"COMPANY. By F. M. GRAY, President.
"GEO. F. EDWARDS, Secretary."

These two papers, which were executed at the same time, must be construed together. Asher Warner was not the owner of the land, but was attorney in fact of Kent, the owner, and had the possession of the land. The paper shows that the name of the attorney in fact was inserted in place of Kent, the vendor of the right of way, and the owner of the land, and will be construed the same as if Kent's name was inserted in the place of Warner's.

The railroad company went on under the above agreement, and constructed its road-bed, and, in doing so, made the ditches before stated. It also constructed a farm crossing, and built bridges across the ditches. These bridges were composed of two black ash stringers, which had been cut upon the right of way, and laid six months or a year, and "had become soured in the sap, and lost much of their elasticity and strength," and the stringers were covered with good pine plank.

It would appear that these bridges were built in 1882. Warner knew of their material, and manner of construction, and used them for the purpose of hauling saw-logs, wood, etc., over them; and it is not claimed that he found any fault with their material or mode of construction, or that they were not sufficient for the purpose, so long as Kent owned the farm.

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On March 15, 1884, Kent, by his attorney, Warner, sold the land to Green, who employed the plaintiff to haul wood, at the time above stated; and, in driving over the north bridge, riding on a load of wood, the sills of the bridge gave way, and precipitated him into the ditch, by which he was injured.

It further appears that in May, 1882, the Elkhart, Niles & Lake Michigan Railroad Company consolidated with the Cincinnati, Wabash & Michigan Railway Company, and that the latter named company succeeded to all the rights and properties of the former, under the statute in such case made and provided.

The circuit judge held that the plaintiff had no cause of action, and directed a verdict for defendant.

Counsel for plaintiff contend—

"That the railroad company was bound to construct and maintain a proper crossing—
"1. At common law, without any agreement or statute.
"2. In pursuance of the agreement.
"3. By statute."

They claim that, in absence of any contract or statute, it is well settled that the right of way across an intervening piece of land, in a case like this, where the part cut off was not otherwise accessible, was reserved at common law, and that the owner of land who had granted the right of way to a railroad company by deed must be held entitled to such crossings over the railroad track and right of way as are reasonably necessary for the use of the premises.

There is no doubt, upon the general proposition, but in such cases the vendor would be obliged to construct and keep in repair the way reserved by necessity; and, in such case, without an agreement, and without statute, the company would not be obliged to construct his right of way across ditches which it had made in order either

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to construct or drain its road-bed. The grant to the company for the purpose of constructing its road carried with it the right to do all things requisite or incidental to effectuate the purpose of the grant. But in this case there is express mention of the right to construct aqueducts and drains.

Upon the second point, the question is whether the agreement "to provide for said Warner a suitable crossing over their said road-bed onto his land" bound the railroad company to build and *maintain* good and sufficient bridges across its ditches, and whether such covenant ran with the land.

These questions were very fully argued by counsel, but I do not see how they are material to the issue. If it is claimed that the tort alleged by which plaintiff was injured arose out of contract, there was no privity of contract between the railroad company and this plaintiff, and hence the plaintiff had no right of action for such tort. *Tollit v. Sherstone*, 5 Mees. & W. 289; *Losee v. Clute*, 51 N. Y. 494; *Bank v. Ward*, 100 U. S. 204, 205; *Longmeid v. Holliday*, 6 Exch. 761; *King v. Railroad Co.*, 66 N. Y. 181, 72 Id. 607.

With reference to structures upon one's own land, a different rule prevails. If a person erects insufficient or dangerous structures upon his own lands, no matter whether he does so personally or by contract, and third persons are injured, the owner will be liable for failing to observe the duty to keep his premises safe, and in such condition as not to cause injury to others lawfully thereon.

I do not think there is any liability under the statute, for two reasons:

1. The crossing in question was not constructed under the statute, but under a contract.
2. The statute only requires farm crossings to be put

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in upon the application of the owners of land lying upon both sides of the right of way. No request was ever made for a farm crossing under any statute of this State.

The conceded facts are that the crossing was put in under the written agreement, but this agreement was ruled out by the court on the ground, as we may suppose, that no neglect of duty owing by the defendant to the plaintiff had been or could be shown. The land upon which the bridge was constructed was, to all intents and purposes, the defendant's. It was entitled to its sole and exclusive use, possession, and enjoyment, except as either it or the statute permitted others to pass upon or occupy the same. The railroad company built the bridge, and was the owner of it. It furnished and owned the stringers and the plank. It owned the plank between the rails. It owned the gates, if gates there were, opening upon this crossing. It was built upon an agreement to provide a suitable crossing over its road-bed, so that the owner or those in possession of the adjoining land could cross from one side to the other. It was a structure built upon its own land, and, by its nature and use, was a continual invitation to those lawfully having a right to cross from one side to the other at that place to enter upon it, and cross there. And so long as this invitation, thus impliedly given to such persons, continued, it was the duty of the defendant, independently of any contract, to see to it that it was safe for the purposes implied by the invitation.

The court erred in excluding the agreement, and in taking the case from the jury. The judgment must be reversed, with costs, and a new trial is ordered.

MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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WILLIAM H. BREZEE v. WILLIAM T. POWERS.

Negligence—Duty of land-owner to one invited upon his premises—Contributory negligence—Question for jury.

1. "When one, expressly or by implication, invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." Cooley, Torts, 605.
2. The question of negligence is usually one for the jury to determine under all of the circumstances of the case; but where the negligence of a defendant is shown by undisputed evidence, it is purely a question of law, to be determined by the court.

   So *held*, where the owner of an opera-house, fronting on a public street, provided side entrances opening on a private alley, which was used by the public as a common way with his permission, and only protected them from falling into an area, opening into a cellar belonging to said building, by an iron railing so low as to come below the knee of a man of ordinary height; and it is held that he was guilty of negligence.
3. Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon inferences to be drawn from facts and circumstances about which honest, intelligent, and impartial men might differ, such a case should be submitted to the jury. *Lowell v. Watertown Township*, 58 Mich. 568; *Carver v. Plank-road Co.*, 61 Id. 584; *Harris v. Township of Clinton*, 64 Id. 447; *Little v. Street Railway Co.*, 78 Id. 205.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued February 18 and 19, 1890. Decided April 11, 1890.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Birney Hoyt (*John A. Fairfield*, of counsel), for appellant.

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Turner, Carroll & Preston, for plaintiff.

[The points of counsel are stated in the opinion.—REPORTER.]

LONG, J. The third count of the declaration states the plaintiff's cause of action as follows:

"And whereas, also, the said defendant, before and on March 19, A. D. 1888, was the possessor and owner of certain other premises, with the appurtenances, situate in the city of Grand Rapids, in the county aforesaid, upon which said premises the said defendant owned and possessed a building which was occupied and used for various business purposes, a portion of said building being used as a theatre.

"And whereas, there now is, and before and on the same day and year aforesaid there were, several separate public entrances and exits to said building on the east side thereof, situate upon the premises aforesaid, and there now is, and before and on the same day and year aforesaid there was, a sidewalk built on said premises upon the east side of said building for all persons to pass and repass at their free will and pleasure into and from said building, as well as for all persons to pass and repass at their free will and pleasure from Pearl street to Lyon street, in the city of Grand Rapids, in the county aforesaid, and which had for a long time theretofore been used by the public as aforesaid, and which said user was upon the invitation of the said defendant, and with his full knowledge and consent.

"And plaintiff further avers that there now is, and before and on the same day and year aforesaid there was, a certain area or hole opening into a certain cellar or vault of, and belonging to, said building and premises of the defendant, which said area or hole opening into said cellar or vault as aforesaid was situate on said premises upon the east side of said building, and between said building and said sidewalk so built along the east side of said building, as aforesaid.

"Yet the said defendant, well knowing the premises, while he was so the possessor and owner of the said building and premises with the appurtenances, and while there was such area or hole as aforesaid, to wit, on the

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day and year aforesaid, wrongfully and negligently permitted the said area or hole to be and continue, and the same was then and there, so negligently, insufficiently, and defectively guarded that by means of the premises, and for want of proper and sufficient guards to the said area or hole, the said plaintiff, who was then and there passing along said sidewalk on said premises, situate along the east side of said building as aforesaid, with reasonable and due care, and without negligence on his part, accidentally and unavoidably fell into said area or hole, by means whereof the said plaintiff then and there became and was greatly hurt, cut, bruised, and wounded," etc.

There does not appear to be much contention over the facts in the case as to the situation or surroundings of the premises, and the manner in which the plaintiff was injured.

The evidence shows that the defendant was the owner of the premises which were situate on the north side of and facing Pearl street, upon which, in 1873 and 1874, he constructed a block known as the "Powers Opera-house Block," which contained an opera-house in the upper stories, and stores upon the ground floor. These stores fronted upon Pearl street, and also to the east on this alley. The stores fronting on the alley were fitted up with entrances and store fronts on the alley, and a sidewalk was constructed from Pearl street northward to the north end of the opera-house building, and has since been kept and maintained there. North of defendant's building, and in rear of it, Mr. Idema erected a building used for offices, facing Lyon street, and put a walk along on the east of that, coming within some 19 feet of the defendant's walk; and the public have for many years used this walk in going from Pearl to Lyon streets, and for entering the stores and other places fronting on the alley, and to reach the offices and the opera-house entrance on the east side. In 1883 or 1884 the defendant

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lowered the opera-house, doing away with the stores fronting this alley, and cut off the back end of the stores facing on Pearl street by constructing a transverse lobby running east and west through the building, to an entrance opening into this alley. The main entrance to the opera-house was, however, from Pearl street. On the west side of the opera-house building is what is called an "arcade," and from which were also doors for ingress and egress to the opera-house. In 1887, it appears, the theatre was leased to Mr. Berger, who for a time closed the doors opening from the alley.

On the night of the injury the plaintiff was employed as state editor of the Telegram-Herald newspaper, and left his place of business on Pearl street, west of the opera-house, about 8 o'clock, to attend a rehearsal in the opera-house to which he had been invited by his son. The opera-house was not open on that night to the general public. Plaintiff testified that he passed the main entrance on Pearl street, but the doors were not open. He did not try them to see if they were fastened, but went to the alley to go in at the side entrance, through which he had always been accustomed to enter, not knowing that the doors there had been closed. After entering the alley, he commenced to unbutton his pants for the purpose of urinating, and walking along at the same time, when his legs struck this railing, and he fell into the area, which was uncovered, and only guarded by this railing, some 19 inches in height, and made of gas-pipe. There is no contention in the case about the ownership of the premises, and but little, if any, dispute about the situation and surroundings thereon that night.

The plaintiff on the trial in the court below claimed, and that claim is insisted upon here, that when one builds a sidewalk accessible to the public it constitutes an invitation to the public to use it, and it becomes the duty of

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such party to guard the public from injury in their use of it, if they exercise ordinary care in going over it. No claim is made by this count in the declaration, and none is made by plaintiff in his brief, that the walk in question here was a public way by dedication, use, or prescription, but that the public used it constantly to the knowledge of defendant, and in great numbers, to pass to and from Pearl street to Lyon street and return, and to pass into the building of defendant and the Idema block.

Upon this branch of the case the court instructed the jury, as requested by plaintiff, as follows:

"If the jury find from the evidence that the defendant in this case built a sidewalk on the east side of his opera-house, and the same was used by the public whenever they had occasion to visit his premises or to pass the same, and find, further, that the plaintiff in this case intended to visit the opera-house on the night of the accident, and was passing along the sidewalk for that purpose, when he met with the accident, the defendant cannot set up as a defense to this action that the property in question is private property, and that the plaintiff was a trespasser thereon."

The court further instructed the jury:

"When a land-owner, expressly or by implication, invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. Where the owner of land, expressly or by implication, invites others to come upon his land, if he permit anything in the nature of a snare to exist thereon which results in injury to one availing himself of the invitation, and who at the same time is exercising ordinary care, such owner is answerable for the consequence."

The defendant contends that these instructions were erroneous:

"1. Because the railing about the area was reasonably

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safe, being a heavy iron railing upon iron posts, and sufficiently high to guard the area, as against any persons passing that way who exercised ordinary care in walking.

"2. Because this open space where the area is situated is not a public way, but the private property of the defendant.

"3. That the language of the court in characterizing this place as a snare was unjustifiable, as applied to the facts in the case."

We will dispose of these questions before proceeding to the main point relied upon by defendant's counsel,—that is, that the plaintiff was guilty of contributory negligence.

Under the undisputed facts appearing upon this record, the public, to the knowledge of the defendant, used this as a common way, and the defendant permitted such use. It appears also, without contradiction, that the defendant, in placing the doors entering the opera-house upon the east side, and placing the walk leading from Pearl street to this entrance, by implication invited the public to go over and upon it to that entrance. It was therefore his duty to make it reasonably safe for all persons passing and repassing. The rule laid down in Cooley on Torts, 605, is as follows:

"It has been stated on a preceding page that one is under no obligation to keep his premises in safe condition for the visits of trespassers. On the other hand, when he, expressly or by implication, invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

This rule is the doctrine of all the courts, and I know of no rule to the contrary. *Cross v. Railway Co.*, 69 Mich. 368 (37 N. W. Rep. 363); *Bennett v. Railroad Co.*, 102 U. S. 577; *Sweeny v. Railroad Co.*, 10 Allen, 368; *Crogan v. Schiele*, 53 Conn. 186 (1 Atl. Rep. 899);

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Association v. Giles, 33 N. J. Law, 260; *Railroad Co. v. Boteler*, 38 Md. 568; *Buesching v. Gas-light Co.*, 73 Mo. 219; *Samuelson v. Mining Co.*, 49 Mich. 170 (13 N. W. Rep. 501).

I am satisfied that the court was not out of the way in characterizing it as a snare. The question of negligence is usually one for the jury to determine, under all of the circumstances of the case; but where the question is based upon undisputed evidence, and where the negligence is so made manifest, it is purely a question of law, and to be determined by the court. Under the circumstances surrounding this case, appearing from undisputed evidence, the court would not have been in error in advising the jury that defendant was guilty of negligence in leaving this area there unguarded except by a rail 19 inches in height. It seems to me that reasonable men could not disagree that such a hole in the sidewalk, if left entirely unguarded, would be dangerous to passers-by, and that a railing placed around it, coming below the knee of a man of ordinary height, would operate as a snare, as one striking against it, going at an ordinary pace, would inevitably be pitched into the hole.

It appears from the defendant's own testimony that, after the opera-house was lowered, the east doors were kept for places of exit, in case of accident in the opera-house building. These doors opened out upon this walk, and only a little north of the area where the accident occurred. It needs no stretch of imagination to see the result of some accident or panic in the opera-house. If these doors were thrown open to the mass of excited people rushing out, they would reach the sidewalk through this eastern exit, only to be thrown into this pitfall. They would have fled from some apparent or apprehended danger inside, only to meet as great a one

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outside; nor would they remember the area, or that it was only guarded by a railing 19 inches high; and yet, in the face of such possible dangers, defendant not only made this exit, but kept and maintained this pitfall. This was not the only danger. People passing in the darkness of night from Pearl to Lyon street, in the exercise of ordinary care, being struck below the knee by this rail, would inevitably be thrown into the hole, and nothing could save their fall.

The first two assignments of error relate to the refusal of the court to strike out the testimony of one of plaintiff's witnesses. We have examined the record, and think the testimony competent, and shall not discuss the question.

The third and fourth assignments of error relate to the ruling of the court in refusing to direct a verdict for the defendant. The court was not in error in so ruling.

The fifth to the thirty-fourth assignments of error, inclusive, relate to the ruling of the court in refusing to give the defendant's 30 requests to charge to the jury. I have carefully read these requests to charge and the charge as given, and am satisfied that such of the requests as the defendant was entitled to have given are fully covered by the charge, and that the others were very properly refused. Some of these requests, however, cover the subject of the plaintiff's contributory negligence, which I shall discuss in connection with the general charge of the court. The defendant asked the court to instruct the jury:

"In this case the plaintiff himself testifies that it was light enough where he fell, and just before he fell, so that he could see the sidewalk, and that he had been through the same passage-way a great many times, both night and day. Under these circumstances, the plaintiff is chargeable with knowledge of the alleged dangerous place, and should have kept the plank walk, and, not

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having done so, he was guilty of contributory negligence."

The court refused this request, and left the question of plaintiff's contributory negligence as a question of fact for the jury, charging them as follows:

"If you find from the facts in this case that plaintiff was there by such invitation, and fell down the area, then, before you can find against the defendant, you must find that the area was not properly guarded; that the plaintiff was not familiar with the dangerous character of the place, or, if familiar with it, that he was exercising a reasonable degree of care in order to avoid it. It will not be sufficient for him, being familiar with the danger, to have heedlessly strolled through there, and unthinkingly fallen in, for under such circumstances he cannot recover.

"If the plaintiff was familiar with the danger, and it was light enough to plainly discern the way, and he carelessly fell in, he cannot recover. If he was familiar with the locality and the danger, and it was dark, then his duty was to have exercised greater care and precaution as the darkness increased in density."

"If from the evidence you should find that the plaintiff knew of the danger, and through mistake, inadvertence, or forgetfulness fell therein, then it matters not whether it was properly guarded or not; he would be guilty of contributory negligence, and could not recover.

"If from the evidence you find that the area was not sufficiently guarded, and that the defendant was careless, and even negligent, in his duty, if you further find that the accident would not have occurred if the plaintiff had exercised reasonable care, then the plaintiff cannot recover."

The defendant also asked the court to instruct the jury that the plaintiff, according to his own testimony, after having turned into the alleged alley, having commenced to unfasten his pants for the purpose of urinating, and at the same time continuing to walk along, and not paying attention to the walk or to the railing of the area, but paying attention to the unfastening of his pants for the purpose of urinating in the alley at the time he fell

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over the railing, is guilty of contributory negligence, and cannot recover; and, further, that the defendant owed plaintiff no duty to provide a place for plaintiff to urinate, and that it was not proper or lawful for the plaintiff to urinate in the so-called alley, on the premises of defendant.

The court refused these requests in the form asked, but instructed the jury upon the subjects as follows:

"If this passage-way was arranged with a sidewalk for the purpose of accommodating people who desired to enter the back part of the opera-house, whether the opera-house or the stores and saloons, or to accommodate passers through from street to street, then it was an invitation for such persons to enter, and the question of plaintiff's attempt to urinate while in there has no bearing upon the defendant's liability, except as it tends to show that plaintiff's attention was thereby diverted from the danger, and he in consequence thereof received the injury; in which case he could not recover. * * *

"If the plaintiff knew or did not know of the condition of this area, and in the night-time was walking through this alley, and instead of paying attention to where he was going was paying attention to his physical necessities, and while his mind was so diverted from his way he fell into the area, then, in that case, he cannot recover. * * * * * * * * *

"In short, in order for the plaintiff to recover, he must have been there by what amounts to an invitation, as before directed, and must show by competent proof that he went into the alley not knowing of the dangerous area, and fell in while exercising such care as a prudent man would exercise in passing the area, and that, on account of the negligence of the defendant alone in not providing sufficient guard, plaintiff was injured, the plaintiff in no way contributing to such injury."

The court could have gone no further in its charge to guard the rights of the defendant without instructing the jury in plain terms that the plaintiff was negligent, and for that reason he could not recover.

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It is not necessary to state the testimony given by the plaintiff and his witnesses as to the manner of the accident. It did appear that the plaintiff for some time worked in the printing-office which was then in the Metropolitan block, on the east side of the alley, and from the windows of which one could look down upon the alley, and that the plaintiff had many times passed along this sidewalk to Lyon street, and also to go into the opera-house on the east side. The plaintiff also testified that on that evening he could see the sidewalk, though it was quite dark, and that in going along on the sidewalk he was unbuttoning his pants. Defendant's counsel insist that, under these circumstances, it was the duty of the court to instruct the jury that the plaintiff was guilty of contributory negligence, and therefore could not recover.

We are not satisfied that the case is so clear that it became the duty of the court to give such instruction. Questions of negligence are usually for the jury to determine, under all the circumstances; and to warrant the court in determining, as a matter of law, that these facts and circumstances show contributory negligence, they must be so conclusive that reasonable and prudent men would not disagree. If from the facts and circumstances the negligence is manifest, then, as I have before stated, it is a matter to be disposed of by the court as a matter of law. Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon inferences to be drawn from facts and circumstances about which honest, intelligent, and impartial men might differ, such a case should be submitted to the jury. *Swoboda v. Ward*, 40 Mich. 424; *Conely v. McDonald*, Id. 150; *Railway Co. v. Slattery*, 39 Law T. (N. S.) 365 Here the case was submitted to 12 men. They

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had heard the testimony of the plaintiff, and all the other witnesses, as to the manner in which the accident occurred, just how the plaintiff walked in there that night, what he was doing, and they knew the whole surroundings. They had visited the premises, and had all the evidence to guide them. They received instructions from the court in a very full and fair charge, putting the question to them in all its phases, and only stopping short of a positive direction to find for the defendant; and yet they have found that the plaintiff exercised due care in passing along the alley there that night. It was manifestly a question of fact for the jury.

In the case of *Lowell v. Watertown Tp.*, 58 Mich. 568, the testimony showed that plaintiff was injured by stepping into a hole in the highway. It was a dark night, but he knew of the hole, and was thinking about it. Counsel claimed that his knowledge of the defect, and his having it in his mind at the time, was conclusive evidence of his want of ordinary care. It was held a proper question for the determination of the jury. This rule has been adhered to in the following cases: *Harris v. Township of Clinton*, 64 Mich. 447 (31 N. W. Rep. 425); *Carver v. Plank-road Co.*, 61 Id. 584 (28 N. W. Rep. 721); *Dundas v. City of Lansing*, 75 Id. 499 (42 N. W. Rep. 1011). The court was not in error in refusing the defendant's request upon the question of furnishing the plaintiff a safe place to urinate, or that he was negligent in attempting to urinate upon the private grounds of the defendant. The instructions given by the court in its general charge heretofore set out gave all that the defendant was entitled to.

Some question is raised about the admissions made by plaintiff after the injury. The court gave instructions

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to the jury upon that part of the case, and we think stated the law of the case.[1]

The case has been very fully and fairly tried by able counsel, and all the material questions of fact found by the jury, under a correct interpretation of the law from the court, and the judgment must be affirmed, with costs.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred.

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PATRICK C. GRADY ET AL. v. MICHAEL H. HUGHES, JULIUS HOUSEMAN, ANTON G. HODENPYL, ET AL.

[See 64 Mich. 540.]

Executors and administrators—Accounting—Fraud—Equity—Parties—Principal and surety.

The liability of sureties in an administrator's bond arises only after the default of their principal is fixed, and then only under the terms of the obligation entered into by them.

So *held*, where, after the discharge of an administrator in probate court on a final accounting, the heirs at law filed a bill against the administrator and his sureties to set aside the orders for the allowance of his account and for his discharge, and for an accounting in the equity court, and for the payment of the balance found due by the sureties; the relief sought being based upon the alleged fraudulent acts and practices of the administrator in the management of the estate, with which the sureties were not alleged to have been conversant, or to have been negligent in not knowing of the same.

[1] "Parol proof of verbal admissions of a party to a suit, if understandingly made, often afford satisfactory evidence; but it frequently happens that the witness may not have understood him, or unintentionally altered a few of the expressions, which may give an effect to the alleged statements completely at variance with what the party did actually say. It is the province of the jury to give to such evidence such weight as it is fairly entitled to, in view of all of the evidence in the case."

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Appeal from Kent. (Burch, J.) Argued February 19, 1890. Decided April 11, 1890.

Bill to set aside orders of the probate court allowing the final account of the defendant Hughes as administrator, and for his discharge, and for an accounting with said administrator, and the payment of the balance found due by defendant Houseman, one of his sureties, and defendant Hodenpyl, the executor of the other surety. Complainants and defendant Hughes appeal from decree sustaining demurrers of Houseman and Hodenpyl, and overruling that of defendant Hughes. Decree affirmed. The facts are stated in the opinion, and in *Grady v. Hughes*, 64 Mich. 540.

John A. Fairfield (*Birney Hoyt*, of counsel), for complainants.

FitzGerald & Barry, for defendant Hughes.

Fletcher & Wanty, for defendant Housemen

Norris & Norris, for defendant Hodenpyl.

CHAMPLIN, C. J. This case comes before us upon demurrers filed by defendants to the bill of complaint. The general demurrer for want of equity can only be considered.

Complainants are heirs at law of Jeremiah Grady, deceased. The defendants are Michael H. Hughes, who was the administrator of Jeremiah Grady, who died in November, 1872; Isabella Grady, who was the widow of Jeremiah Grady; Julius Houseman, who is the surety in the probate bond of Michael H. Hughes as administrator; and Anton G. Hodenpyl, who is the executor of Richard E. Butterworth, who was the other surety in the administrator's bond. Mary Adams and James Adams are grandchildren of Jeremiah Grady, deceased; their parents being

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dead. Hughes, Houseman, and Hodenpyl filed separate demurrers, and upon hearing the court overruled the demurrer of Hughes, and sustained the demurrers of Houseman and Hodenpyl, and dismissed the bill as to each of them. Complainants and defendant Hughes bring separate appeals.

As to defendant Hughes, we think the bill shows sufficient equity to require an answer; and we therefore affirm the decretal order overruling his demurrer, and requiring him to answer, with costs. See *Grady v. Hughes*, 64 Mich. 540.

The prayer of the bill is that a certain order entered by the probate court allowing a final account of the administrator, and another order, subsequently made, discharging such administrator from his trust, may be vacated, set aside, and held for naught, and that defendant Hughes be required to render his final account as administrator of the estate of Jeremiah Grady, deceased, and that an account be taken in this court of the assets which came to Michael H. Hughes' hands as administrator, and his disposition and expenditure of the same, and a balance struck, and the amount found and stated due from him to the estate, and that the sureties on the bond be decreed to pay such amount forthwith. The relief sought against Hughes is based upon his fraudulent acts and practices in the management of the estate. But, as the sureties are not alleged to have been conversant of the fraud, or that they ought to have known it, they are not, and could not be, required to account with complainants; and their liability to pay for the default of their principal arises only after his default is fixed, and then only under the terms of the obligation entered into by them.

The bill shows no right to equitable relief against defendants Houseman and Hodenpyl, and the order sus-

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taining the demurrer and dismissing the bill as to each of them is affirmed, with costs.

MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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THE PEOPLE, EX REL. MEDARD A. METEVIER, v. JOSEPH THERRIEN.

Officers—Jurisdiction of Governor to remove—Charges of misconduct.

1. The authority of the Legislature to confer upon the Governor the power of removal of county officers was sustained in *Clay v. Stuart*, 74 Mich. 411.
2. The Governor has no power to order an investigation except upon *specific* charges; nor can he remove an officer, after such investigation, unless upon such a showing and record of the proceedings as will show to the world and to the accused for what particular act or acts of misconduct he has forfeited his office, and been removed therefrom. *Dullam v. Willson*, 53 Mich. 393.
3. A charge that such an officer is "an habitual drunkard" is as explicit as it well could be.
4. Charges that respondent is—
   a—Wholly incompetent to execute properly the duties of the office, and—
   b—That he is guilty of official misconduct,—
   Are mere conclusions of fact, and fall under the condemnation of *Dullam v. Willson*, 53 Mich. 393.
5. A charge that the respondent "arrested innocent people without process, and after confining them a short time, without arraignment, allows them to go free," and that he "assaults peaceful citizens, and in one instance inflicted serious injury, dislocating a shoulder," is altogether too general to meet the requirements of justice or the statute. How. Stat. § 653.
6. Where the charges presented to the Governor are not sufficiently specific, the defect is not cured by the service of a bill

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of particulars five days before the hearing, containing the necessary specifications, the respondent being entitled to a notice of eight days, accompanied by a copy of such charges. How. Stat. § 654.

7. The Governor cannot, by any act of his own, enlarge the power granted him by the Legislature; nor can the Legislature, by any act, deprive a person of a right to hold an office to which he has been elected or appointed, and whose duties he has assumed, except by due process of law.

Quo warranto. Submitted February 19, 1890. Decided April 11, 1890.

Information in nature of *quo warranto* to test the legality of the removal of the relator from the office of sheriff by the Governor, and to oust the respondent, who was under-sheriff, and is acting as sheriff. Judgment of ouster entered. The facts are stated in the opinion.

S. V. R. Trowbridge, Attorney General (*Watts S. Humphrey*, of counsel), for relator.

James J. Brown, for respondent.

MORSE, J. This is a *quo warranto* proceeding to test the legality of a removal by the Governor.

The relator was duly elected sheriff of Mackinac county in the fall of 1888, and duly qualified; his term commencing January 1, 1889. The respondent held the office of under-sheriff, under and by appointment from relator. August 26, 1889, the Governor removed the relator from his office, and said under-sheriff is now acting as sheriff.

I think the Governor never acquired any jurisdiction in the premises, and that the removal was therefore unauthorized and unlawful. The Governor has no power to remove elective officers unless he strictly pursues the methods pointed out by the Constitution and laws of this State. The Legislature is authorized by the Constitution to—

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"Provide by law for the removal of any officer elected by a county, township, or school-district, in such manner and for such cause as to them shall seem just and proper." Article 12, § 7.

The Legislature, by virtue of the authority above conferred, have specified the causes for which such an officer can be removed, to wit:

When such officer is incompetent to execute properly the duties of his office, or has been guilty of official misconduct, or of willful neglect of duty, or of extortion, or habitual drunkenness, or has been convicted of being drunk; or whenever it shall appear by a certified copy of the judgment of a court of record of this State that such officer, after his election or appointment, shall have been convicted of a felony. How. Stat. § 653.

The same section vests the Governor with the power of removal of such officer for the causes above specified, but declares the method of procedure to be taken in such cases. Before such officer can be removed, charges must be made against him in writing, verified by the affidavit of the party making the same, and exhibited to the Governor; nor can he take any action until this is done. It is further provided that the Attorney General, or the prosecuting attorney of the county of which the person accused is an officer, who may be directed by the Governor to make the inquiry into the charges, shall give at least *eight* days' notice to the accused of the time and place at which he will proceed to the examination of witnesses in relation to such charges before some circuit court commissioner or judge of probate—

"*And he shall also, at the time of giving such notice, serve on the officer accused a copy of such charges.*" How. Stat. § 654.

In *Clay v. Stuart,* 74 Mich. 411, the authority of the Legislature to confer the power of removal upon the Governor, under the Constitution, was sustained by this Court; that being the only question raised upon the

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record. But it was said, further, that a person duly elected to and holding an office under such election could not be deprived of the same without due process of law; "and this requires notice to the party, a hearing, and determination."

In the case before us it is plain to me that the relator did not have the notice required by the Constitution and the laws of this State; nor was he removed upon any charge properly made to the Governor, and acted upon by the executive. The Governor has no right to order an investigation except upon specific charges; nor can he remove, after such investigation, unless upon such a showing and record of the proceedings as will show to the world and to the accused for what particular act or acts of misconduct he has forfeited his office, and been removed therefrom. In *Dullam v. Willson*, 53 Mich. 393, the authority of the Governor as to removals was exhaustively considered; and it was there held, under an express provision of the Constitution authorizing the executive, when the Legislature was not in session, to remove State officers for—

"Gross neglect of duty, or for corrupt conduct in office, or for any other misfeasance or malfeasance therein,"—

That the power of removal could only be exercised upon charges specifying the particular acts or neglect relied on to make out the cause alleged, which must be one of the causes specified in the Constitution (Article 12, § 8); and that the respondent must have notice of these charges and *specific allegations*, and reasonable notice of the time and place when and where he will have an opportunity of a hearing thereon.

Mr. Justice CHAMPLIN, in the leading opinion, at page 407, says:

"There must be charges specifying the *particulars* in which the officer is subject to removal. It is not suf-

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ficient to follow the language of the Constitution. The officer is entitled to know the *particular* acts of neglect of duty or corrupt conduct, or other act relied upon as constituting malfeasance or misfeasance in office; and he is entitled to a reasonable notice of the time and place when and where an opportunity will be given him for a hearing; and he has a right to produce proofs upon such hearing."

Mr. Justice CAMPBELL is still more emphatic in his statement of the rights of the accused. At page 413, he says:

"It has always been held that general conclusions, or conclusions on general charges, were not enough, but the facts on which the judgment was based must appear, either in specific charges or in specific findings, on which the party has been heard on legal proofs," citing a large number of decisions in favor of that proposition.

And again, on the same page—

"These cases not only require a proper hearing on proper charges, but hold that those charges must consist of distinctly stated facts, and not general charges of wrong or neglect, so that it can be determined, as a matter of law, whether what the removing body treats as wrong is within the legal quality of wrong."

An examination of the proceedings here will show that the law as interpreted in *Dullam v. Willson, supra,* was not complied with. The charges preferred against the relator, and exhibited to the Governor, were as follows:

"1. Because he is wholly incompetent to execute properly the duties of his said office.
"2. Because he is an habitual drunkard.
"3. Because he is guilty of official misconduct.
"4. Because he is now laboring under an attack of *delirium tremens,* and his liberties have to be restrained to prevent him doing bodily injury to citizens against whom he has some imaginary grudge.
"5. Because, while in his drunken debauches, he arrests innocent people without process, and after confining them a short time, without arraigning them, allows them to go free; and also, while intoxicated, he assaults peace-

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ful citizens, and in one instance inflicted serious injury, dislocating a shoulder."

As to the charge of being an habitual drunkard, this was as specific as it well could be; but, as will be seen further along, this charge was not insisted upon at the investigation, or acted upon by the Governor.

The first and third charges are mere conclusions of fact, and fall under the condemnation of *Dullam v. Willson*. No specific acts of official misconduct are alleged, nor is any time or place of such misconduct given. There is given the accused absolutely no information of what he is to be called upon to meet. The same is true as to in what respect he is incompetent to perform the duties of sheriff; but, as this charge was not acted upon, it may be dismissed without further comment.

The fourth and fifth charges, if treated as specifications of official misconduct, might be of some use to the accused as information; but the fourth, which is the only specific allegation, was dropped, and the fifth is altogether too general to meet the requirements of justice or the statute. It fails to state any time or place, or the name of any person arrested while the sheriff was in a drunken debauch, or injured by him in an assault.

This want of specific allegations in the charges was attempted to be cured by a "bill of particulars" filed, and served upon relator, July 12, 1889, which bill is as follows:

"To MEDARD A. METEVIER, Sheriff of Mackinac County, Michigan:

"Please take notice that the specific acts relied upon in the investigation of the charges preferred against you as sheriff, a copy of which charges has heretofore been served upon you, are as follows:

"1. For an assault and battery committed upon one James Maloney on June 24, 1889, at the city of St. Ignace, Mackinac county, Michigan.

"2. For an assault and battery committed upon Thomas Gal-

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lagher on June 24, 1889, at the city of St. Ignace, Mackinac county, Michigan, and for the illegal arrest and imprisonment of said Gallagher at said time and place.

"3. For the illegal arrest and imprisonment of Nellie Strohn on June 28, 1889, at the city of St. Ignace, Mackinac county, Michigan.

"4. For the illegal arrest and imprisonment of Minnie Bellant on June 28, 1889, at the city of St. Ignace, Mackinac county, Michigan.

"5. For threats against the life of James J. Brown on June 28, 1889, at the city of St. Ignace, Mackinac county, Michigan.

"6. For drunkenness on June 24, 25, 26, 27, and 28, 1889, at the city of St. Ignace, Mackinac county, Michigan.

"Yours, etc.,

"JAMES J. BROWN."

But the charges served upon him, and in time under the statute, were not these specific allegations, but the same general charges presented to the Governor, and upon which the investigation was ordered.

It is maintained by the counsel for the relator that the charges set out in this so-called "bill of particulars" do not constitute any of the offenses or misconduct named in the statute. I cannot agree with him in this. If the relator was drunk for five successive days, and during such drunkenness committed two assaults and batteries, and made three illegal arrests, and threatened the life of the prosecuting attorney, he was not only guilty of official misconduct, but had shown himself incompetent to perform the duties of a conservator of the peace and sheriff of a county. But the trouble is that these, in the *first* place, are not the charges presented to the Governor, and upon which the investigation was ordered; and, *second*, the accused was not given the notice of *eight* days before the hearing upon them, required by the statute. The hearing was noticed for July 17, 1889,—only five days after this bill of particulars was served upon relator. These jurisdictional questions were raised by the relator

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when he first appeared before the judge of probate of Mackinac county, the officer appointed to hold the court of investigation, but were overruled by him and the inquiry proceeded with.

It appears from the finding of the Governor that—

"Certain of the charges aforesaid [referring to the original charges exhibited to the Governor] had been proven,"—

But what particular charge does not appear. The Governor also finds—

"The said Medard A. Metevier guilty of official misconduct as alleged against him by the said Michael Marley,"—

Marley being the person who verified the original charges by affidavit, as required by the statute; but in what this official misconduct consisted, or when it occurred, or where, does not appear from the Governor's judgment, from the original charges, or from anything found anywhere in the record before us. Metevier has been charged with official misconduct, and, after inquiry, removed from office for the same; but we are left entirely in ignorance of what he had done, or omitted to do, in his official business, which is found by the Governor to be official misconduct. Nor can the accused or any one else ascertain from the charges preferred, or the judgment rendered, for what act or acts he has been deposed and deprived of an office to which he was duly elected and qualified. This office, under these circumstances, cannot be said to have been taken away from him by "due process of law," and the language of Justice CAMPBELL in *Dullam v. Willson*, 53 Mich., at page 413, already quoted, seems peculiarly applicable to this case. There have been no charge here of "distinctly stated facts." There has been no "specific charges" or "specific findings." He has not been convicted of any charge but one,

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and that the third, to wit, guilty of official misconduct. He has been acquitted of the others. This charge was general, and the finding is general.

It is claimed by respondent's counsel that, the Governor having passed upon the sufficiency of the charges, his jurisdiction thus assumed cannot be questioned by this Court. This is not so. The Governor cannot, by any act of his own, enlarge the power granted him by the Legislature; nor can the Legislature, by any act, deprive a person of a right to hold an office to which he had been elected or appointed, and whose duties he has assumed, except by constitutional methods, by due process of law. The Governor cannot foreclose the right of the courts to preserve to such officers their constitutional rights. He cannot order an inquiry upon charges of misconduct not embraced within the statute granting him power to act; nor can he act upon a general charge of official misconduct, as is the third charge here, without any specifications under it, informing the executive or the accused in what particular thing or things this official misconduct consists. And while he had authority, under the charges filed with and exhibited to him, to order an inquiry into the habitual drunkenness of Metevier, and the fact of his laboring at that time under *delirium tremens*, caused by excessive drink, he could not, because he entertained jurisdiction for this purpose, and had a right to do so, extend his jurisdiction further, and go outside of the charges made to him in the statutory way; nor could he supplement and aid defective and imperfect charges by the act of the prosecuting attorney, or other officer conducting the inquiry, in serving upon the accused at the inquiry, or any number of days before, less than eight, more complete and specific allegations of wrong-doing. The right to hold this office is just as sacred in the eyes of the law to Metevier as the right to

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hold the property he has earned. It is a property right, and one of which he can only be divested by a strict conformity to the statute. If the time of notice, or such completeness of notice as will give the accused full information of what he has to meet, can be dispensed with, or shortened or curtailed, then other formalities of the statute may be disregarded, until it shall at last become a mere question of the executive will or pleasure.

The people of Mackinac county have rights also, as well as the accused. They have the right, under the Constitution, to elect their county officers, and to have such officers serve out the terms for which they were elected. It was not contemplated by the Constitution that such officers should be removed but for grave reasons; and the Legislature, in its construction of the constitutional provision authorizing such removal, has carefully guarded the rights of such officers, and pointed out the method of such removal. In my opinion it is a power to be carefully used, and in exercising it the statutes must be strictly followed. The same rule should apply as to penal statutes. It imposes something more than a penalty. The statute authorizes the forfeiture of a political and valuable franchise, the loss of which is accompanied with more or less of shame and disgrace. The right of the individual is a matter of public concern, as the public is composed of individuals; and neither of the three great departments of our government—executive, legislative, or judicial—can trench upon such rights without damage to the whole people.

It is not claimed but that the Governor acted with the best of motives, and under the impression that he had full jurisdiction in the premises; and it certainly appears from the record that he gave the relator a full and fair hearing before him by counsel, after the inquiry before the judge of probate had been concluded. But this can-

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not alter the case. The proceedings before this were not in accordance with the statute, and ought not to be permitted to stand approved, and as a precedent in other cases. This is not alone a question in which the relator and respondent are interested. It is one fraught with deep concern to every county officer, and to the whole people of this State, for all time to come, as a test of the rights of the citizen office holder, as regards his removal for cause before his term expires, and as to the method to be employed in such removal.

Judgment of ouster must be entered against the respondent, and the relator restored to his rights by the proper entry in this Court. He will also recover his proper costs against respondent.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred.

JOHN NIEMANN v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

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Railroad companies—Permitting cattle to run at large—Contributory negligence.

This case is ruled by *Robinson v. Railroad Co.*, 79 Mich. 323, where the owner of cattle is held guilty of contributory negligence in turning them loose in a public highway, near a railroad crossing, without a keeper, the road being properly fenced, etc. In this case the cattle entered upon the grounds of the company at a place where it was not required to maintain a fence.

Error to Saginaw. (Gage, J.) Argued April 9, 1890. Decided April 11, 1890.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

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Hanchett, Stark & Hanchett, for appellant.

Trask & Smith, for plaintiff.

LONG, J. Plaintiff's cow was killed by one of the defendant's freight trains while passing through the village of Zilwaukee, Saginaw county. The plaintiff resides west of the defendant's railroad track, and on March 20, 1888, drove six of his cows across the track, and let them go from there to the river to drink. On their return the last cow to pass over the track was killed by the passing freight train.

The negligence claimed is that the defendant's road was not fenced; that the train was run at a greater speed than the rules of the road permit, and faster than is safe through the streets of the village; and in not giving the signals required by law.

Plaintiff had judgment on a trial before a jury in the Saginaw circuit court, and defendant brings error.

The only error assigned is that the court was in error in submitting the questions raised on the trial to the jury. After the close of the testimony, defendant's counsel asked the court to instruct the jury that, inasmuch as the undisputed evidence of the plaintiff showed that at the time the plaintiff's cows were wandering about in the vicinity of the railroad crossing, and at the time of the accident he was giving no attention or care to his cattle, he was guilty of contributory negligence, and could not recover. The court refused this instruction, but left not only the question of defendant's negligence in running its train at a great rate of speed, and without proper signals, but also the question of the plaintiff's contributory negligence, as questions of fact, to the jury.

It is contended here that, under the undisputed evidence in the case, there was nothing to go to the jury upon the question of the plaintiff's contributory negli-

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gence. It appears from the plaintiff's own testimony that he drove his cows on that day across the track of the railroad, and let them go to the river to drink. He saw the cows coming back from the river, thought they were all right, and paid no further attention to them. He stood talking with a friend, heard the train pass, and a few moments afterwards was told that one of the cows was killed. He was then three blocks away from where the cow was killed, and the blocks were some 23 rods in length each. He knew that it was not time for any regular train to pass, and did not know that any train was approaching. That is, the plaintiff, from his own testimony, having turned his cows across the track towards the river, paid no further attention to them, and, though he knew the track of the railroad was not fenced, he left them to wander where they would, and at the time of the accident they were some 70 rods distant from where he stood. It appears that the cow entered upon the grounds of the defendant company where by law it was not compelled to keep and maintain a fence.

This is the case made by the plaintiff's own testimony, and it falls directly within the ruling of this Court in *Robinson v. Railroad Co.*, 79 Mich. 323. The court was in error in refusing to give the defendant's request to charge. The jury should have been instructed that the plaintiff was guilty of negligence in permitting his cows to run at large in the face of the possible danger from passing trains. The question of such negligence is so fully discussed in the case above cited that no discussion of the subject is necessary here.

The judgment of the court below must be reversed, with costs, and new trial ordered.

The other Justices concurred.

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EDMUND W. KITTRIDGE AND JOSEPH WILBY v. EDWARD D. KINNE, CIRCUIT JUDGE OF WASHTENAW COUNTY.

Assignment for benefit of creditors—Supervisory control of chancery court—Transfer of cause.

1. Upon application to the chancery court to exercise its supervisory powers over common-law assignments, the assignment becomes a civil proceeding pending in the circuit court, and is subject to be transferred under How. Stat. §§ 6495–6502, which provide for the transfer of suits from one circuit to another where the presiding judge is disqualified to sit in the cause. *Fraser v. Circuit Judge*, 48 Mich. 176.

2. The following general propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—It was the intention of the Legislature to place common-law assignments fully under the control and supervision of the circuit courts in chancery.

b—From the time of the filing of the assignment in the office of the clerk of the court it may be said to be a proceeding pending in that court, for all the purposes of the act.

c—The authority of the court to exercise its supervisory powers is called into being whenever application is made by any one authorized by the act to invoke such powers, and then the power of the court, which was before dormant, is called into activity, and its jurisdiction fully attaches to the assignment, and all matters connected therewith.

d—This term "proceedings," as used in the statute, includes all matters connected with or attending the exercise of the power conferred upon the circuit courts in chancery which are necessary to enable the court to exercise its superintending control and authority conferred by the statute.

Mandamus. Submitted April 9, 1890. Granted April 11, 1890.

Relators applied for *mandamus* to compel the removal of a common-law assignment, and all proceedings thereunder, under How. Stat. §§ 6495–6502, providing for the

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transfer of causes, etc. The facts are stated in the opinion.

H. E. Spalding and *John D. Conely*, for relators.

Thomas A. Wilson, for respondent.

CHAMPLIN, C. J. On January 14, 1890, the George T. Smith Middling Purifier Company, of Jackson, made a common-law assignment, under and in accordance with the provisions of section 8739 of Howell's Statutes, and the sections following, relating to such assignments.

The relators are creditors. They filed a petition in Jackson circuit court, alleging that the inventory was imperfect, in that it omitted property belonging to the assignor to a large amount; and also that the appraisal was incorrect, in that it greatly undervalued property contained in the inventory. They prayed that the assignee might be ordered to file a new and supplemental inventory and appraisal. After the foregoing petition was filed in the circuit court for the county of Jackson, in chancery, the relators filed a petition with Hon. E. D. Kinne, circuit judge of Washtenaw county, setting up the making of the assignment, and the filing of the same in the office of the clerk of the circuit court for the county of Jackson; the filing and pendency of their petition in that court; the fact that Hon. Erastus Peck was judge of the circuit court of Jackson county, and that he was disqualified to act or sit in the proceedings under said assignment, by reason of being a stockholder, director, and secretary of the assignor; that the solicitor for the petitioners resided in Wayne county; and prayed for the removal of the assignment, the petition, and all matters connected therewith to the circuit court for the county of Wayne.

The petition came on to be heard before Judge Kinne,

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when the assignees, by their solicitor, made a motion that the petition be dismissed for want of jurisdiction, which was granted by the court. No objection was made to the form or substance of the petition, or on account of want of proper notice; but the want of jurisdiction is based exclusively upon the statute authorizing the transfer of causes from one circuit to another, approved February 12, 1855, as amended, being section 6495 *et seq.* How. Stat. That statute authorizes the transfer of any civil suit or proceeding pending in any circuit court to another, when certain special causes exist. That the cause alleged in the petition for transfer is sufficient is not disputed.

The objection is that the assignment filed in the office of the clerk of the circuit court for the county of Jackson is not a civil suit or proceeding pending in the circuit court. The circuit courts of the respective counties are courts in chancery for such counties, and the clerk of the circuit court fills the office of register in chancery. Whether the filing of an assignment, under the terms of the statute, in the office of the clerk of the circuit court of the county, constitutes such assignment a suit or proceeding in that court, depends upon the intent of the statute, and the construction which its several sections ought to receive.

The first section (How. Stat. § 8739[1]) of the act requires the assignment, inventory, list of creditors, and bond to be filed in the office of the clerk of the circuit court of the county. The clerk of the court is to approve the bond. The assignees are required to file their reports in the clerk's office, and, in case there shall be any fraud in the matter of the assignment or in the execution of the trust, or if the assignee fails to comply with the provisions of the act, or neglects promptly and faithfully to execute his trust, the circuit court in chancery, on

[1] How. Stat. § 8739, amended by Act No. 215, Laws of 1889.

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the application of any person interested, may, in its discretion, appoint a receiver, and may order a summary examination before himself of any party or witness at any stage of the said cause relative to any matters of said trust. Proofs of claims are to be filed in the clerk's office. If the claim is contested, the contest is to be entered upon the law side of the court, and there tried, and the amount of the claim as finally adjudicated is the amount upon which dividends are to be computed.

Section 8749[1] confers upon the circuit court in chancery of the proper county supervisory power of all matters, questions, and disputes arising under such assignment, except as otherwise provided in the act; and it may, on the application of the assignee or of any person interested, make all necessary and proper orders for the management and disposition of the assigned property, the distribution of the assets and avails, the recovery of all property claimed by third persons, and to prevent any fraudulent transfer or change in the property or effects of the assignor, or the allowance or payment of any unjust or fraudulent claim out of his estate; and may, from time to time, require new bonds or sureties; and may, on the application of the assignee or of any creditor, at all times require the assignor, upon reasonable notice, to appear before him, and submit to an examination on oath upon all matters relating to the disposal of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law, which examination is to be reduced to writing and filed in the office of the county clerk.

From these provisions it is gathered that it was the intention of the Legislature to place common-law assign-

[1] As amended by Act No. 181, Laws of 1889.

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ments fully under the control and supervision of the circuit courts in chancery. From the time of the filing of the assignment in the office of the clerk of the court it may be said to be a proceeding pending in that court, for all the purposes of the act. The authority of the court to exercise its supervisory powers is called into being whenever the court is applied to by any one authorized by the act to invoke such powers, and then the power of the court, which was before dormant, is called into activity, and its jurisdiction fully attaches to the assignment, and all matters connected therewith. It is then a civil proceeding pending in the circuit court, and is subject to be transferred under the statute first above referred to. It is proper, when the circuit judge is disqualified, that the entire proceedings should be transferred, in order that the policy of the law should be carried out without embarrassment. The term "proceedings" in the statute includes all matters connected with or attending the exercise of the power conferred upon the circuit courts in chancery which are necessary to enable the court to exercise its superintending control and authority conferred by the statute.

In *Fraser v. Circuit Judge*, 48 Mich. 176, a claim against an estate was disallowed by commissioners, and the creditor appealed to the circuit court for the county of St. Clair. On application, the proceeding was transferred to the Lapeer circuit court, and this Court was asked to issue a *mandamus* to prevent the circuit court of Lapeer county from hearing the appeal. It was held that the proceedings upon the disallowance of the claim were such as could be transferred. Mr. Justice COOLEY said:

"The case is within the terms of the statute, for it is a proceeding pending in the circuit court on the law side thereof. *Prima facie*, therefore, it is within the intent. If so, it was rightly transferred. No constitutional pro-

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vision precludes such a transfer, and the Legislature in providing for it, and in conferring upon the circuit court to which the case is sent authority to adjudicate, has given, by implication, all the necessary incidental powers, including the power to enforce its jurisdiction. With any question of incidental or possible embarrassment or inconveniences we have no concern on this motion."

We think the case is in point upon this application. We think the relator is within the letter and spirit of the act, and the circuit judge is advised that he has jurisdiction, and should proceed to exercise it.

The writ will issue in accordance with the prayer of the petition.

The other Justices concurred.

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ADONIRAN J. SMITH v. HENRY H. APLIN, AUDITOR GENERAL.

War bounties—Constitutional law—Vested rights—Appropriation of moneys by the Legislature—Statute of limitations.

1. *Mandamus* will not lie to compel the Auditor General to draw his warrant on the State treasury in payment of the war bounty of $100 due a soldier under Act No. 23, Laws of 1864, there being no money in the treasury out of which such warrant could be lawfully paid, and none appropriated for that purpose, as shown by the Auditor General's return.

2. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

   a—The *right* of soldiers coming within the provisions of Act No. 23, Laws of 1864, to a State bounty of $100, became a *vested* right, of which the Legislature could not lawfully deprive them.

   b—The proviso to Act No. 173, Laws of 1881, repealing the

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war bounty acts of 1864 and 1871, recognized and preserved the rights of soldiers to their bounty under said acts, and is a distinct waiver, if one was needed, of the statute of limitations.

c—Plighted faith between the State and her soldiers, who in the hour of the country's peril enlisted in defense of the Nation, and went forth to do battle for the honor of the flag, and the preservation of our free institutions imperiled by the civil war, who suffered untold hardship, and who *all* risked life, and many fell, and others were wounded, on the field of battle, will not permit the plea of the statute of limitations to bar a sacred promise made to them, no matter how long a time has elapsed between the promise and the failure to discharge the obligation according to the terms in which it was made.

d—It was the duty of the Legislature to provide money for the payment of the war bounty offered by the State under Act No. 23, Laws of 1864, and the history of those times, of which the Court will take judicial notice, shows that that duty was performed.

e—The Legislature, by the acts of February 5, 1864, March 2, 1865, and March 21, 1865, provided ample means for paying the bounties offered under Act No. 23, Laws of 1864. These acts *authorized* and *directed* the Governor and State Treasurer, whenever necessary for the purpose of paying State bounties, to contract loans and issue bonds therefor, and pay the avails over to the credit of the "war fund," which bounties were directed to be paid from *this* fund upon the warrant of the Auditor General, upon proper vouchers or estimates of the Quartermaster General of the State, certified by the Governor. This was a sufficient appropriation by the Legislature, and authorized the Auditor General, until the passage of Act No. 173, Laws of 1881, to draw his warrant on this "*war fund*" whenever the money for the purpose of paying bounties reached that fund, upon proper certificates of the Quartermaster General and Governor.

f—The object and intent of the Legislature, in the passage of Act No. 173, Laws of 1881, was to do away with the authority of the Quartermaster General in allowing claims for bounties, and place claimants for bounties in the same category as others having claims against the State for adjustment.

Mandamus. Submitted January 23, 1890. Denied April 18, 1890.

Relator applied for *mandamus* to compel respondent to

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issue a warrant on the State treasury for $100, claimed to be due him as "war bounty" under Act No. 23, Laws of 1864. The facts are stated in the opinion.

H. J. Patterson, for relator.

S. V. R. Trowbridge, Attorney General, and *Edward Cahill,* for respondent.

CHAMPLIN, C. J. The relator applies for a *mandamus* to compel the Auditor General to issue to him a warrant upon the State Treasurer for $100 bounty money to which he is entitled under the laws of the State of Michigan.

In his application for the writ the relator states that he was a private in Company H, Twenty-third Regiment of Michigan Infantry Volunteers, and mentioned in the certified copy of the certificate of the Quartermaster General, S. B. Daboll, as follows:

"QUARTERMASTER GENERAL'S OFFICE,
"LANSING, MICH., Jan. 24, 1889.

"I hereby certify that, as certified to this office by the Adjutant General of the State of Michigan from the records in the Adjutant General's office, Adoniram J. Smith, Co. H, 23d Regiment of Michigan Infantry, enlisted on the third (3) day of September, 1864, at Flint, Michigan, and was duly mustered into the service of the United States for the term of one year. Discharged at Salisbury, N. C., June 28, 1865.

"And I further certify that under Act No. 23 (Laws of) 1864, and by virtue of such enlistment, the said Adoniram J. Smith was entitled to a State bounty of $100, and that, as appears from the records in this office, there is now due him $100, on account of said bounty.

"S. B. DABOLL,
"Quartermaster General of the State of Michigan."

That shortly after the certificate was issued he presented it to the Auditor General of the State of Michigan, and requested him to issue his warrant on the State treasury for the sum of $100, as required by law, and the said Auditor General neglected and refused to issue the

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same; that he has never received his State bounty, and the same is justly due him from the State of Michigan, and hence prays for the writ.

The Auditor General shows cause against the relator, as follows:

"3. He admits that directly after the certificate attached to relator's petition, and marked, 'Exhibit A,' was made, said relator presented the same to the respondent, and requested him to issue his warrant for the sum of one hundred dollars, and that the respondent neglected and refused to do, and still does refuse to issue to the said relator.

"4. That there is no money in the State treasury out of which the warrant demanded by the relator could be lawfully paid, if drawn by the respondent, and no appropriation has been made by law for that purpose.

"5. No voucher nor estimate of the Quartermaster General of the State, certified by the Governor, has been presented to the respondent, to authorize the issue of a warrant to the relator as by him demanded, or to the Quartermaster General for the relator's benefit.

"6. It does not appear from relator's petition on file whether the relator was credited on the quota of this State, or any military district thereof, under any call or order of the President or any military authorities of the United States, or of this State, made or issued since January 1, 1864, nor whether he was at the time of his enlistment a resident of this State, or where he resided, nor whether he was enrolled among the persons liable for draft, nor whether he was credited to the subdistrict, township, or ward in which he was enrolled, or in which he resided, and that he was not enrolled elsewhere in this State. It does not appear from the said petition whether any showing of such facts, or any of them, has ever been made to the Quartermaster General. And respondent avers, from an inspection of the official records of said Quartermaster General's office, that there is no record showing upon what quota, nor to what subdistrict, township, or ward, said relator was credited, nor where he was enrolled.

"7. That, if any right ever accrued to relator to have and receive the State bounty referred to in his petition filed in this cause, such right accrued more than twenty-

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five years before the filing of said petition; nor did said right accrue to the said relator at any time within ten years next before the relator requested and received from the Quartermaster General the certificate attached to his said petition, and marked 'Exhibit A,' nor within ten years next before said relator presented said certificate to respondent, and requested him to issue his warrant for one hundred dollars, nor within ten years next before the filing of said petition.

"8. That at the time of his enlistment, as stated in his petition, there was no authority of law for paying any such bounty as is demanded by the relator, for the reason that the amount authorized to be raised by loan, by Act No. 24 of Session Laws of 1864, had been exhausted, and notice of the fact had been given by the proclamation of the Governor to the people of the State on, to wit, the 21st day of July, 1864, of which said relator had notice.

"9. That the respondent had no authority of law for drawing the warrant asked for by the relator, nor had the State Treasurer any authority for paying the same if drawn, because, by Act 173 of the Session Laws of 1881, all laws relating to the payment of said bounties were repealed."

The sections of Act No. 23, Laws of 1864, approved February 5, 1864, pertinent to our present inquiry, read as follows:

"SEC. 8. There shall be paid from the war fund of this State a uniform State bounty of one hundred dollars to each person below the rank of a commissioned officer who may hereafter enlist and be mustered into the military or naval service of the United States, and who shall be credited on the quota of this State, or any military district thereof, under any call or order of the President or military authorities of the United States, or of this State, made or issued since the first day of January, A. D. eighteen hundred and sixty-four: *Provided*, That none of the bounties provided for in this act shall hereafter be paid to any volunteer, being a resident of this State at the time of enlisting, who shall be credited to any subdistrict, township, or ward other than that in which he is enrolled, or, if not enrolled, where he resided at the time of enlistment.

"SEC. 9. The Quartermaster General of this State shall

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pay to each volunteer mustered into the service as aforesaid, as soon thereafter as practicable, the sum of one hundred dollars as a State bounty; and for this purpose he is hereby authorized and required to cause blanks to be prepared similar to the pay-rolls used in the United States army, which shall exhibit the name, age, and place of residence of such volunteer, date of time and place of enlistment, and the place of credit and date of payment, and amount paid; and each volunteer, upon receiving said bounty, shall subscribe his name to such roll: *Provided*, The Quartermaster General shall not pay the bounty contemplated by this section to any person, being a resident of this State, unless he shall present the certificate of the provost marshal that he is credited to the township or ward in which he is enrolled, or unless such person shall present his own affidavit that the township or ward to which he is credited is the township or ward in which he actually resides, and that he is not enrolled elsewhere in the State."

Sections 1 and 2, Act No. 132, Laws of 1871, read as follows:

"SECTION 1. That whenever application shall be made to the Quartermaster General by any soldier, sailor, or marine, or by the widow, child, or children of a deceased soldier, sailor, or marine, for any bounty heretofore authorized by the laws of this State, it shall be the duty of the Quartermaster General to examine said claim, and, if it shall appear that said applicant is entitled to the sum claimed, or any part thereof, he shall make the necessary certificate showing the amount so due, which certificate he shall forward to the Auditor General. The Auditor General shall thereupon examine the books and records in his office, and if it shall not appear therefrom that said bounty, or any part thereof, has been paid to the claimant, or any other person, he shall draw his warrant upon the State treasury for the amount so due, the amount of which warrant, upon presentation thereof, shall be paid to the soldier, sailor, or marine, or to the widow, child, or children of a deceased soldier, sailor, or marine, named therein, and to no other person.

"SEC. 2. No bounty shall hereafter be paid excepting in the manner hereinbefore provided, and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

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The last act of the Legislature bearing upon the question at issue is Act No. 173, Laws of 1881, which reads as follows:

"That each and all of the several acts relative to the payment of bounties to volunteers contained in and constituting chapter nineteen of the Compiled Laws of Eighteen Hundred and Seventy-one be, and the same are hereby, repealed: *Provided*, That any and all rights heretofore accrued under any of said acts are hereby preserved, the same as if the above repeal had not been enacted."

The two acts first above quoted from are embraced in chapter 19 of the Compiled Laws of 1871.

Had the relator any rights which accrued under and by virtue of the acts repealed? If he had, they were saved by the proviso. If he became entitled to a bounty under the provisions of section 8 of Act No. 23, Laws of 1864, his right to receive the bounty became a vested right. It was held in *East Saginaw Salt Mfg. Co. v. State Auditors*, 9 Mich. 327, that, when the State offered a bounty upon all salt manufactured, after the act took effect, of 10 cents a bushel, and the relator had manufactured several thousand bushels before the act, passed two years later, took effect, amending the first act so as to offer a bounty of only 10 cents a barrel, the relator was entitled to the bounty it had earned under the first act; and the Court held that the relator had acquired a vested right to the bounty offered under the first act upon all salt manufactured before the second act took effect, and that it could not be deprived thereof by the last act. If the bounty earned by the manufacture of salt is a vested right of which the party cannot be deprived, how much more is a bounty a vested right which is earned by a soldier enlisting in the military service of the United States to do duty in the defense and maintenance of the government. In the one case the risk is the loss of

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profits or property; in the other, the soldier risks his life and limb, and all the hardships incident to the calling. I have no doubt that the right to the bounty, under section 8, of those coming within its provisions, became a vested right, of which the Legislature could not lawfully deprive the soldier.

It was the duty of the Legislature to provide money for the payment of the bounty offered by the State, and the history of those times, of which the Court will take judicial notice, shows that the Legislature did provide a war bounty fund, and borrowed money by the issue of its bonds to supply such fund. And as long as the fund lasted the soldier received his bounty under the law at the time of enlistment, but the fund was not sufficient. The means provided by the Legislature, by the first act, had become exhausted, and our attention is called by counsel for respondent to a proclamation which they claim was issued by the Governor on July 21, 1864, calling attention to the fact that the appropriations made for the purpose of paying bounties had been exhausted.

By Act No. 24, Laws of 1864, approved February 5, 1864, the Legislature authorized the issue of bonds to the amount of $500,000, to be called the "War bounty loan of the State of Michigan," to provide means to pay the bounties offered by Act No. 23, above cited. The report of the State Treasurer made to the Governor, and published in the Session Laws of 1865, shows that up to November, 1864, there had been issued of war bounty bonds, under the act of February 5, 1864, but $230,000. As the proclamation was made on July 21, 1864, this amount may have been exhausted, but authority was given to issue to the amount of $500,000. By another act approved March 2, 1865,[1] the Legislature authorized the issue of $1,000,000 of bonds for the purpose of pay-

[1] See Act No. 85, Laws of 1865.

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ing the $100 bounty, as provided in the act; and by a still later act, approved March 21, 1865,[1] the Legislature authorized a further issue of $500,000 to pay bounties.

The report of the State Treasurer made in 1866 shows that the full amount authorized by the act of February 5, 1864, had been issued, and $715,000 in bonds had been issued under the act of March 2, 1865. The reports of the State Treasurer show a further issue of $25,000 in 1868, and of $44,000 in 1870. The report of the State Treasurer made as of date September 30, 1872, and published in the Session Laws of 1873, shows that war bounty bonds had been issued and paid for from the sinking fund to the amount of $843,000, and that there were outstanding bonds issued amounting to $463,000, making a total issue under the first two acts aforesaid of $1,306,000. No bonds appear to have been issued since. If necessity required, $694,000 might have been issued, and may still be issued, and placed to the credit of the "war fund," out of which these bounties were by law directed to be paid. It is stated in the brief of counsel for the respondent that under the call of the President for 500,000 men the quota for Michigan was 18,282. If this quota was filled by enlistments which would entitle the volunteer to a bounty under the act of February 5, 1864, it would require $1,828,200 to pay such bounties.

It was held, however, by this Court in *People v. Hammond*, 13 Mich. 247, that the offer of a bounty under the act of February 5, 1864, did not extend to the whole 500,000 men included in the call of the President of February 1, 1864; that this call was intended to cover 300,000 made in October, 1863, leaving the act to operate only in favor of those who should enlist under the quota assigned to Michigan to make up the call for 200,000. This would

[1] See Act No. 295, Laws of 1865.

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be two-fifths of the number assigned under the call for 500,000, or, in round numbers, 7,313 men, who, if credited under the act, would be entitled to $100 bounty, requiring only the sum of $731,300. If this be true, it would seem that there ought to be enough money in the "war fund" derived from the issue of $1,306,000 of "war bounty" bonds to pay every soldier who enlisted under this call, and entitled by the provisions of Act No. 23, Laws of 1864, to receive a bounty.

The Auditor General in his answer, however, positively avers that the fund is exhausted, and that there has been no money appropriated out of which to pay the bounty to relator. By referring to the report of the Auditor General for the year 1874, published by authority, there is a statement on page 305, Table No. 37, showing the payments of bounties by the Quartermaster General, from which it appears that the amount of bounties paid by him after the act of February 5, 1864, took effect is $1,602,620, which considerably overdraws the bounty money in the "war fund." The Auditor General, in his report for the year ending September 30, 1872, called attention to the fact that, in his and in the Attorney General's opinion, $39,925 had been erroneously paid as bounties to soldiers; and the Legislature, by joint resolution No. 12 of the Session Laws of 1873, instructed the Attorney General to investigate and ascertain if the State had been defrauded in the payment of bounties, or whether bounties had been illegally paid. I have examined the reports of the Attorney General for the years 1873, 1874, and 1875, and no mention is made of the subject in such reports.

Upon representations that some claims for bounties had been paid upon forged or fraudulent vouchers, the Legislature of 1885, by Act No. 157, authorized the Board of State Auditors to hear and examine such claims, and, if

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it should appear upon such examination that the "bounty due" said soldiers so enlisted and mustered has been paid to any other person upon forged or fraudulent vouchers, and that his bounty was still justly due him, they should so certify to the Auditor General, who should draw his warrant for the amount upon the State Treasurer, who should pay it out of moneys appropriated for that purpose, or from any moneys not otherwise appropriated. And as indicating the intent of the Legislature to deal justly by the soldier, and in view of what was said in *Blanchard v. Church*, 47 Mich. 644, the Legislature declared—

"That the statute of limitations shall not be a bar to any claim by such soldier, or his widow, children, or legal representatives."

So far as the seventh clause af the respondent's answer relies upon the statute of limitations, I do not think it ought to prevail. There is no pretense that relator's bounty has been paid to him. Plighted faith between the State and its soldiers, who in the hour of the country's peril enlisted in defense of the Nation, and went forth to do battle for the honor of the flag, and the preservation of our free institutions imperiled by the civil war, who suffered untold hardship and who all risked life, and many fell, and others were wounded, on the field of battle, will not permit the plea of the statute of limitations to bar a sacred promise made to her soldiers, no matter how long a time has elapsed between the promise and the failure to discharge the obligation according to the terms in which it was made. I cannot conceive that a great commonwealth like Michigan, that looks with pride and gratitude upon the honorable record of its soldiers in the war, could be guilty of such base ingratitude as to say to them:

"It is true, we offered you a bounty of $100 if you

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would enlist, and it is true that we have not paid it to you, but it is now more than twenty-four years since the war in which you fought has successfully terminated, and you have grown old and gray and needy, and meanwhile the State has doubled her wealth, yet, as you have not called for it for so long a time, we will not pay you."

I do not understand the plea to voice the position of the Legislature or the will of the people. I think the act of the Legislature of 1881, repealing the bounty acts, in the proviso therein contained recognizes and preserves the rights of the soldier to his bounty, and is a distinct waiver, if one was needed, of the statute of limitations.

The fact set up in the answer, which must be taken as true unless issue is framed, that there is no money appropriated, is fatal to the relator's prayer. Article 14, § 5, of the Constitution, declares—

"No money shall be paid out of the treasury, except in pursuance of appropriations made by law."

And it is equally clear that where an appropriation has been made payable out of a particular fund, if the fund has become exhausted, the Auditor General would not be warranted in drawing an order upon that fund.

The Legislature, by the several acts above alluded to, have provided ample means for paying the bounties given by the State to those entitled. These acts authorize and *direct* the Governor and State Treasurer, in the name and behalf of the people of the State, whenever it shall become necessary for the purpose of paying a State bounty, to contract loans and issue bonds therefor, and pay the avails over to the credit of the "war fund," and the bounty was directed to be paid from this fund upon the warrant of the Auditor General, upon proper vouchers or estimates of the Quartermaster General of the State, certified by the Governor. This was a sufficient appropriation by the Legislature, and the Auditor General would until the act of 1881 be authorized to draw his warrant

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on the "war fund" whenever the money for the purpose of paying bounties reached that fund, upon proper certificates of the Quartermaster General and Governor. I do not see as the Legislature has been remiss, or that it could do anything more. The responsibility seems to rest with the Governor and State Treasurer, who doubtless will act when they become aware of the necessity.

It remains to be noticed what was the object, intent, and effect of the repealing act of 1881. While that act preserves the right to the bounty, it repeals the acts providing for the method of ascertaining and establishing the right upon which the payment of the bounty depends. Under the act of 1871, the claimant was required to make application to the Quartermaster General, who was to make examination, and, if he found that the claimant was entitled, he was to make a certificate showing the amount due and forward it to the Auditor General. The Quartermaster General was by this act made a special tribunal for examining and allowing these particular claims against the State. By the repeal of that law the person claiming a bounty must establish his claim before the Board of State Auditors. By Article 8, § 4, of the Constitution, it is provided that—

"The Secretary of State, State Treasurer, and Commissioner of the State Land-office shall constitute a Board of State Auditors, to examine and adjust all claims against the State not otherwise provided for by general law."

I think it was the object and intent of the Legislature to do away with the authority of the Quartermaster General in allowing claims for bounties, and place claimants for bounties in the same category as others having claims against the State for adjustment. Certainly the certificate of the Quartermaster General can have no

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force or effect after the law authorizing it has been repealed.

It follows from what has been said that the application of the relator must be denied, for reasons stated.

MORSE, LONG, and GRANT, JJ., concurred.

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CLARENCE M. BURTON v. THOMAS P. TUITE, CITY TREASURER OF DETROIT.

[See 78 Mich. 363.]

Public records—Right of inspection.

The following books, kept in the office of the city treasurer of Detroit, namely:

a—One book containing the record of the certificates of cancelled tax sales;

b—One book containing a list of such lots as have been sold to the city, or to individuals, for special city taxes, and have been from time to time redeemed;

c—One book containing a list of such lots or parcels of land in the city of Detroit as have been heretofore sold to said city for delinquent city taxes, said sales having been afterwards assigned by the city to individuals;—

Which books are denominated by the treasurer as "*Stub Receipt Books*," who claims that they are mere *memoranda* for the convenience of the office, and that all the *data* contained therein is entered in the "Record Books," which are accessible to the public, but which transfer of *data* to such record books might be delayed for days or weeks, at the pleasure of the treasurer, are *public records* in the treasurer's office, in the full sense of Act No. 205, Laws of 1889, and under the opinion of this Court in *Burton v. Tuite*, 78 Mich. 363.

Contempt proceedings. Argued February 18, 1890. Decided April 18, 1890.

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Relator applied for an order enforcing an order of this Court directing respondent to allow relator to inspect the records and files in his office. The facts are stated in the opinion.

Henry A. Chaney, for relator.

John W. McGrath, for respondent.

MORSE, J. The respondent is city treasurer of Detroit. The relator is engaged in the abstract business in said city. We held, upon application of the relator for *mandamus* (see *Burton v. Tuite,* 78 Mich. 363), that certain records in said treasurer's office were public records, and that relator had a right to examine them, and to make *memoranda* or transcripts therefrom under Act No. 205, Laws of 1889, subject to such proper and reasonable regulations as the treasurer might make, consistent with the public use of such records. Our order in the case, as made and entered in the journal on January 8, 1890, commanded the said Tuite not only to allow the relator to inspect and examine the particular records involved in that case, but also to generally furnish to him and his subordinates reasonable and proper facilities for the inspection and examination of the records and files in his office, and for making *memoranda* and transcripts therefrom, in compliance with said above-named act of the Legislature. In the opinion, as well as in the order, of this Court we meant to so express our views and commands as that there should be no mistake or misunderstanding as to the rights and duties of the respective parties to this controversy. But we are now called upon to enforce our order.

January 13, 1890, a petition was filed in this Court by the relator showing the proper service of our writ of peremptory *mandamus* upon respondent, and setting forth

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that, notwithstanding our order and command therein contained, the respondent had since said service refused to allow relator to have access to or look at certain other public records in said office of the city treasurer, to wit: One book containing the record of the certificates of tax sales that have been canceled; one book containing a list of such lots as have been sold to the city of Detroit, or to individuals, for special city taxes, and have been from time to time redeemed; and a book containing a list of such lots or parcels of land in the city of Detroit as have been heretofore sold to said city for delinquent city taxes, said sales being afterwards assigned by the city to individuals. Upon this petition, January 15, 1890, we issued an order to the said Thomas P. Tuite, to show cause why he should not be punished for contempt and disobedience of the said writ of *mandamus* of date January 8, 1890. Respondent answered this order on January 28, 1890, denying that the above-named books were public records, or that the relator had any right to examine them under the statute, or our decision and order above stated. The books in question were denominated by the respondent as "Stub Receipt Books," and it was insisted in said answer that the same were not public records, but mere *memoranda* for the convenience of the office, and that all the *data* contained therein is entered in the "Record Books," which are accessible to relator. It was, however, admitted upon the argument that the transferring of the *data* upon these stub books to the record books might be delayed for days or weeks, at the pleasure of the respondent. After hearing both parties by counsel upon the petition and answer, we directed certain interrogatories to be served upon the respondent, to be answered by him under oath, and that other proofs be taken touching the truth of the matters involved in the petition and answer, as well as the nature and character and use of said books.

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The answers to said interrogatories and other testimony taken have been returned to us.

We do not intend to again go into the discussion of the questions that were settled by us in the first opinion filed in this case. We are satisfied that the books referred to, by whatever name they are called, are public records in the treasurer's office, in the full sense of the statute, and under the opinion above referred to; that the respondent is guilty of contempt and disobedience of the order of this Court in refusing to the relator the privilege of examining them, and making transcripts thereof.

We think, however, that this disobedience has occurred, not so much from a willful disregard of our command, as from bad advice. Under the circumstances, we are not disposed to impose a heavy penalty, but we hope that our orders will hereafter be strictly complied with, and without delay or attempted evasion, as the fine in this case will not stand as a precedent in any future case of disobedience of the mandates or decrees of this Court.

An order will be entered adjudging the said Thomas P. Tuite guilty of contempt and disobedience of our aforesaid writ of *mandamus*, and that he pay to the people of the State of Michigan a fine of $25, with the costs of this proceeding to be taxed by the clerk of this Court; such payment to be made to said clerk within 10 days after a copy of such order shall be served upon him.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred.

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ALICE P. EVERTS v. GILBERT T. EVERTS.

Deeds—Parol trusts in land—Passive trust—Title of beneficiaries.

1. Trusts in land for the benefit of third persons cannot be established by *parol* understandings with the grantor. How. Stat. § 6179; *Shafter v. Huntington*, 53 Mich. 310.

   So *held*, where land was conveyed in trust for the benefit of the grantor and his wife during their natural lives (held to be a passive trust), and with a parol understanding, as claimed by the grantee, that on the death of the beneficiaries he was to convey the land to his daughter, a niece of the grantor.

2. A deed from a husband to his brother of 160 acres of land, containing a declaration that the lands are conveyed in trust for the benefit of the grantor and his wife, who are to have the use and benefit of the land, being the income thereof, during their natural lives, and from which deed the word "heirs," was stricken before its execution, is held to have created a *passive* trust; that the title of the grantee was merely nominal; and that the legal title passed at once to the beneficiaries.

Appeal from Shiawassee. (Newton, J.) Argued April 9, 1890. Decided April 18, 1890.

Bill to compel conveyance to complainant of 160 acres of land deeded to defendant by complainant's husband, who afterwards conveyed it to her. Complainant appeals from decree declaring the *latter* deed valid as to the homestead 40 acres, which decree is reversed, and a decree entered in this Court in accordance with the prayer of the bill. The facts are stated in the opinion.

S. S. Miner (*G. R. Lyon*, of counsel), for complainant, contended:

1. The alleged parol trust was void; citing How. Stat. § 6179; *Bernard v. Bougard*, Har. Ch. 130; *Wright v. King*, Id. 12; *Trask v. Green*, 9 Mich. 366; *Enos v. Sutherland*, 11 Id. 541; *Groesbeck v. Seeley*, 13 Id. 345; *Newton v. Sly*, 15 Id. 396; *Brown v. Bronson*, 35 Id. 418; *Shafter v. Huntington*, 53 Id. 310.

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2. The special clause in the deed operated to give to the beneficiaries the actual use and possession of the land; citing *Mandlebaum v. McDonell*, 29 Mich. 84; *Parks v. Parks*, 9 Paige, 107.

3. The trust was a passive one; citing How. Stat. § 5565; *Burdeno v. Amperse*, 14 Mich. 97; *Church v. Clark*, 41 Id. 730; *Calder v. Moran*, 49 Id. 14; and in every case of a naked trust the statute executes it, and places the legal estate in the *cestui que trust;* citing *Thompson v. Waters*, 25 Mich. 234; *Steevens v. Earles*, Id. 44; and cases above cited.

C. F. Collier (*Hugh McCurdy*, of counsel), for defendant, contended:

1. How. Stat. § 5730, dispenses with the use of the word "heirs" in order to create an estate of inheritance in the grantee, and provides that an intention to convey a less estate shall be expressed in the deed.

2. Uses, annexed to a perfect gift, however gratuitous, are enforced; citing *Jackson v. Cleveland*, 15 Mich. 94; *Weare v. Linnell*, 29 Id. 224; *Palmer v. Sterling*, 41 Id. 218; *Barber v. Milner*, 43 Id. 248.

MORSE, J. The complainant was married in April, 1881, to Eugene O. Everts, a brother of defendant. Immediately upon such marriage she and her husband moved upon a farm, of 160 acres, in Shiawassee county, and made it their home until May, 1886. This farm was received by Eugene O. Everts as part of his distributive share of his father's estate.

In March, 1883, Eugene went to Oakland county, to visit his brother, and while there executed and delivered to the defendant a warranty deed of this farm. The expressed consideration of the deed was one dollar, but there was no real consideration. The deed, in the body, purported to be given by "Eugene Everts and Alice Everts, his wife," but complainant refused to sign it when it was brought to her for her signature. The word "heirs" was stricken out before execution, so that the grant was to Gilbert T. Everts and his assigns. After

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the description, and before the *habendum* clause, was the following:

"The above-described lands are hereby conveyed to the said Gilbert T. Everts by said Eugene Everts and Alice Everts in trust for their benefit, and to be held by said second party [Gilbert T. Everts] for the use and benefit of first parties [Eugene and Alice Everts]; and it is fully understood that said first parties are to have the use and benefit of said land, being the income thereof, during the natural lives of both the said first parties."

The evidence shows that, until 1886, Eugene worked and managed the farm the same as if this deed had not been made, and Gilbert exercised no control over it. In May of that year, Eugene moved to Burton, a small village near Owosso, renting the place for two years to one Monroe upon shares,—each to furnish one-half and receive one-half. While Gilbert was consulted about this leasing, it is plain enough that he exercised no authority or control in the matter. One-half of the produce, while Monroe was tenant, was paid or delivered to Eugene or complainant.

Eugene died December 18, 1887. The complainant testifies that before his death he requested Gilbert to deed the premises back to him. Gilbert made no reply, but promised to come and see him the next week, and talk about the matter, but did not do so. December 17, 1887, the day before he died, Eugene, by warranty deed, conveyed the premises to complainant.

She filed her bill in the circuit court for the county of Shiawassee, in chancery, in January, 1889, alleging that the deed to Gilbert was executed by her husband while he was "on a spree," and intoxicated, and when he did not comprehend what he was doing, and could be easily persuaded; that there was no consideration for the deed, and that Eugene was persuaded by Gilbert to execute it upon the pretense that it was a mere trust-

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deed for the benefit of Eugene and his wife, and that said Gilbert would take no title in said land as against them; and Gilbert further represented that the only object in deeding the land was to place it in such shape that Eugene could not fool it away while drunk, and to prevent creditors and others from taking undue advantage of his weakness. She further averred that Gilbert promised Eugene that whenever he became a sober man he could have the title of the land back again. She asked a decree that Gilbert be required to convey the premises to her free and clear of all incumbrances, except what amount said Gilbert might be found to have paid for her husband or on his account, which she expressed a desire and willingness to pay.

Gilbert answered, denying that the deed was procured as charged by complainant, or that there was any understanding or agreement that he should ever reconvey the premises to Eugene.

He avers that Eugene went to Holly, Oakland county, and there, of his own free will and accord, executed this deed without any suggestion or solicitation on the part of the defendant, and that it was so made by him for the purpose of saving unto himself, and unto the said complainant, the use, benefit, and income of the said lands during the natural life of himself and that of the said complainant, and that defendant was to hold the said lands in trust for that purpose, and at the death of the said Eugene O. Everts, and the said complainant, he was to deed the said lands to Carrie May Everts, a daughter of this defendant; and that at the time of the execution of said deed, and in presence of one Patterson and the witnesses to said deed, he so declared and made a trust, in parol, to the effect that, after the death of himself and the said complainant, defendant was to deed, and convey

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the said lands in fee-simple to the said Carrie May Everts.

He denies that Eugene ever requested him to deed back the premises. He admits that Eugene had the possession and the control of the premises, either by himself or his tenant, until his death; and claims the benefit of a cross-bill, and prays that the deed be declared valid, and the parol trust to Carrie May Everts established, and the deed from Eugene to complainant be decreed void.

The circuit judge decreed that the deed from Eugene to complainant was valid as to the portion of the premises used and occupied as a homestead, and invalid as to the balance; that the deed to Gilbert conveyed the title in fee of the lands not embraced in the homestead to Gilbert, subject to the full payment of the net income of such lands to complainant during her natural life.

The testimony shows that up to within a year or so of his death Eugene was an intemperate man, and a spendthrift while in liquor, and that he had squandered some $3,000 in cash received from his father's estate. There is ground for believing that the deed was made to Gilbert for the express purpose of preventing the possible waste of his land, and loss of his home.

Much evidence was given of declarations made by Eugene to various persons supporting the claim of a parol trust, and that he intended, when he and his wife were dead, that the farm should go to Carrie May Everts. But such parol trust, if it existed, is forbidden by our laws, and cannot be enforced. How. Stat. § 1679; *Shafter v. Huntington*, 53 Mich. 310 (19 N. W. Rep. 11), and cases cited.

The trust in this deed was an express one. Such a trust might be created, under our statutes, for the following, among other, purposes:

"To receive the rents and profits of lands, and apply them to the use of any person, during the life of such

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person, or for any shorter term, subject to the rules prescribed in the last preceding chapter [chapter 213."] How. Stat. § 5573, subd. 3.

It is contended by complainant's counsel that the trust created by this deed to Gilbert does not come within the provision of our statute above quoted; that it is a passive, and not an active, trust; that under it the trustee had nothing to do but to hold the title for the beneficiary.

It must be conceded that the clause in the deed creating the trust does not, in express terms, authorize or empower the trustee to receive the rents and profits of the land; and it is evident, from the conduct of the parties, that it was not intended that Eugene should give up the possession of the premises, or put its management into the control of Gilbert. Gilbert had nothing to do with the premises, except to hold the title, until Monroe moved off, in 1888, when he put his brother William in possession, to hold the place for him, five years after the execution of the deed. The complainant and her husband were to have the "use and benefit" of said lands during their natural lives; and such use and benefit, it seems clear from the deed itself, was to be the control and possession and management of the farm. Gilbert did nothing except to hold the title, and the striking of the word "heirs" from the deed has some significance in construing the trust. If we considered the deed or trust at all ambiguous, so that we would be justified in examining the surroundings and circumstances of its execution or creation, and the acts of the parties, in order to determine its true intent and meaning, we should, upon such examination, be forced to the same conclusion that we reach from the language of the deed or trust as written.

We are satisfied that the trust was a passive one, and

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that the legal title in the lands passed at once to the beneficiaries. How. Stat. §§ 5565–5567. The title of Gilbert must be regarded as merely nominal, and not connected with any power of actual disposition or management in relation to the lands. The complainant, holding a deed from her husband, is now the sole owner in fee of the premises.

The decree of the court below must be reversed, and a decree entered here in accordance with the prayer of the bill, in favor of complainant, with costs of both courts.

The other Justices concurred.

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In the Matter of the Estate of Hugh Reid, Deceased. Agnes Glover v. Margaret O. Reid and William Greenshields.

Will—Construction—Life-estate—Jurisdiction of probate court—Certiorari.

1. The probate court has jurisdiction to construe a will, such power being necessarily involved in the power to assign the estate of the testator on the settlement of the executor's account. *Patterson v. Stewart*, 38 Mich. 402; *Kelly v. Reynolds*, 39 Id. 464; *Langrick v. Gospel*, 48 Id. 185.

2. Under a will bequeathing to the testator's wife all the estate of which he died seised or possessed, "to and for her own use and benefit and disposal, for and during the term of her natural life, leaving said estate to be used and disposed of by her, wholly to her discretion and judgment as she may decide her needs require," and the remainder of said estate, after her decease, to go to four of the testator's children, naming them, the widow takes a *life-estate*, in the use of which she must be governed by the rules applicable to tenants of such estates.

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3. The practice adopted in this case, of bringing the proceedings to this Court by *certiorari*, was approved in *Kelly v. Reynolds*, 39 Mich. 464.

Certiorari to Macomb. (Canfield, J.) Argued April 10, 1890. Decided April 18, 1890.

Certiorari to review the judgment of the circuit court of Macomb county, affirming the order of the probate court construing a will. Reversed. The facts are stated in the opinion.

T. M. Crocker, for plaintiff in *certiorari*, contended:

1. A will giving a life-estate, with the added power of disposition for certain uses or purposes, or upon certain necessities, does not, by such added power of disposition, increase the life-estate into an absolute title, nor does it defeat the remainder over, given to heirs; citing *Burleigh v. Clough*, 52 N. H. 267, 271 (13 Amer. Rept. 23); *Fairman v. Beal*, 14 Ill. 244; *Boyd v. Strahan*, 36 Id. 355, 360; *Hamlin v. Express Co.*, 107 Id. 443, 448; *Kaufman v. Breckinridge*, 117 Id. 305, 315; *Paine v. Barnes*, 100 Mass. 470, 471; *Bamforth v. Bamforth*, 123 Id. 280, 282; *Kelley v. Meins*, 135 Id. 231, 234; *Welsh v. Woodbury*, 144 Id. 542; *Rubey v. Barnett*, 12 Mo. 3; *Russell v. Enbanks*, 84 Id. 83, 88; *Bean v. Kenmuir*, 86 Id. 666; *Harbison v. James*, 90 Id. 411; *Benesch v. Clark*, 49 Md. 497, 504; *Denson v. Mitchell*, 26 Ala. 360; *In re Foster's Will*, 76 Iowa, 364; *In re Oertle's Estate*, 34 Minn. 173.

2. The probate court can assign the residue of a testator's estate; citing How. Stat. §§ 5964, 5965; order the payment of legacies; citing Id. § 5997; and has jurisdiction of all matters relating to the settlement of the estates of such deceased persons; citing Id. § 6760. How could all of the things be done if the power to construe the testator's will was not given it?

3. This Court, in *Kelly v. Reynolds*, 39 Mich. 465, construed a will in proceedings brought here by writ of *certiorari*, and it has on various occasions clearly pointed out when error would not lie, and when *certiorari* was the proper remedy; citing *Holbrook v. Cook*, 5 Mich. 225; *In re Robinson's Estate*, 6 Id. 137, 142; *Conrad v. Button*, 28 Id. 365; *Cameron v. Bentley*, Id. 520; *Brinsmade's Appeal*, 52 Id. 537.

Eldredge & Spier, for defendant Reid.

Dwight N. Lowell, for defendant Greenshields.

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CAHILL, J. A decision of this case involves the construction of the will of Hugh Reid.

The will was admitted to probate in Macomb county in March, 1881, and defendant Greenshields was appointed administrator with the will annexed in the May following. The estate consisted wholly of personal property. Soon after the appointment of the administrator, an order was made on the petition of Margaret O. Reid, the widow, allowing her $150 out of the estate, and also $5 per week for her support. No further action was taken in the probate court for some years. Mr. Greenshields rendered no account, but was permitted by the widow to handle the estate, and look after its investment. This continued down to March, 1888, when Agnes Glover, who is a daughter of Hugh Reid, filed a petition in the probate court asking a revocation of the order allowing five dollars per week to the widow. On the same day she filed a petition that the administrator be cited to render a final account. Action was taken on the petition; and upon the hearing in the probate court it was insisted by the administrator and the widow that plaintiff had no interest in the estate of Hugh Reid under his will; that the will gave the property absolutely to the widow; and that the children of deceased had therefore no standing in court. The probate court took that view, and entered an order, from which we extract so much as is important here:

"And it further appearing to the court that, by the terms of the last will and testament of said deceased, the said Margaret O. Reid, widow of said deceased, is entitled to the residue of said estate of said deceased, *as legatee and absolute owner thereof*, and to the possession thereof, to be used and disposed of by her; that all debts, funeral expenses, and all expenses of administration of said estate, have been paid or provided for; and that the said William Greenshields has since, about the expiration of one year from his appointment, having then paid said debts

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and expenses, held the residue of said estate at the request of, and for, Margaret O. Reid.

"After hearing D. N. Lowell, attorney for said William Greenshields, T. M. Crocker, attorney for John Reid and other children of said deceased in said will named, in opposition to the allowance of said amount, and in opposition to an order directing the said administrator to turn over to said widow, *as such legatee and absolute owner thereof*, the residue of said estate, and Eldredge & Spier, attorneys for said widow."

Then follows a provision relating to the administrator's account, which is not important here. The order concludes as follows:

"It is further ordered and decreed that the said administrator do transfer and assign to the said Margaret O. Reid, widow of deceased, the notes, mortgages, and cash constituting the residue of the estate, including all interest accrued thereon since the filing of said account, and that he account to the said Margaret O. Reid therefor, and turn the same over to her, as legatee and absolute owner thereof."

From this order the plaintiff appealed to the circuit court, where it was affirmed, and the proceedings are now brought to this Court by *certiorari*. This practice was approved in *Kelly v. Reynolds*, 39 Mich. 464.

Counsel for the administrator and for the widow insist that the probate court had no jurisdiction to construe this will, or to determine the rights of the parties under it; that the words, "as legatee and absolute owner thereof," were put into the order before quoted from at the suggestion of counsel for plaintiff; that but for such suggestion and request of plaintiff's counsel the order would have been, simply, that the administrator turn over to the widow the residue of the estate, as the person entitled, under any construction of the will, to the possession and control of it. But this does not appear from the record. If we are allowed to take the facts as they are conceded on the argument, then we must not only

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find that the clause in the probate order which is objected to by the defendants' counsel was put in at the suggestion of plaintiff's counsel, but we must also find that, on the hearing in the probate court, counsel for defendants objected to the plaintiff's being heard there on the ground that under the will the entire estate passed to the widow, and that the plaintiff, having no interest, had no standing in court,—thereby challenging a construction of the will.

But we think the probate court had jurisdiction to construe the will. Such power is necessarily involved in the power to assign the estate of a testator on the settlement of an executor's account. How. Stat. §§ 5964, 5965; Gary, Prob. Law, §§ 50, 624. This jurisdiction in the probate court has often been recognized in this State. *Patterson v. Stewart*, 38 Mich. 402; *Kelly v. Reynolds*, 39 Id. 464; *Langrick v. Gospel*, 48 Id. 185 (12 N. W. Rep. 38).

The clause in the will over which the controversy arises is as follows:

"I, Hugh Reid, of the village of Romeo, in the county of Macomb and State of Michigan, being of sound mind, do hereby make, publish, and declare this my last will and testament, that is to say: I give and bequeath unto my wife, Margaret O. Reid, all my estate of which I may die seised or possessed, to and for her own use and benefit and disposal, for and during the term of her natural life, leaving said estate to be used and disposed of by her, wholly to the discretion and judgment of my said wife as she may decide her needs require; the remainder of said estate, after her decease, to be for and go to my four children, viz., Jennette, Isabella, John, and Agnes, share and share alike.

"I hereby appoint my said wife, Margaret O. Reid, the executor of this, my last will and testament; and, lastly, I revoke all former wills, declaring this writing alone to express the whole of my will."

We cannot agree with the construction put upon this will by the probate court in the order from which we

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have quoted, and by the circuit court on appeal. We think the widow takes a life-estate only, and that at her death the remainder, if there be any, will go, not to her heirs, but to the children of the testator named in the will. In her use of the estate the widow will be governed by the rules applicable to tenants of life-estates. She may not waste or squander it in profligate living. As the record shows her to be a prudent and careful woman, no danger of that kind is to be apprehended. But no complaint can be made of her use of so much of the estate as her own sound judgment and discretion "decide her needs require." Only an abuse of such discretion could be inquired into.

We have not lost sight of the very able argument and exhaustive citation of authorities by counsel for defendants in support of their position that when the use of personalty for life is given, coupled with the *unlimited power of conversion and disposition*, the gift is absolute, and an attempted devise over is void for repugnancy.[1] But we cannot apply that doctrine to this case. We think the power of conversion and disposition under this will cannot be held to be *unlimited*, without doing violence to the real intent and purpose of the testator. This should never be done, if it can be avoided. *Jones v. Jones*, 25 Mich. 401. If Mrs. Reid had died the day after her husband, would any one seriously argue that the estate would have passed to her heirs, to the exclusion of the testator's children, to whom he clearly intended it to go in such a contingency? Yet the estate passed at once, if at all, upon the death of Mr. Reid.

[1] Counsel cited *Jones v. Jones*, 25 Mich. 401; *Proctor v. Robinson*, 35 Id. 284; *Sutphen v. Ellis*, Id. 446; *Weir v. Stove Co.*, 44 Id. 506; *Ireland v. Parmenter*, 48 Id. 633; *Speirs v. Roberts*, 73 Id. 666, 673; *Hale v. Marsh*, 100 Mass. 468; *Howard v. Carusi*, 109 U. S. 725; *Jones v. Bacon*, 69 Me. 34; *Campbell v. Beaumont*, 91 N. Y. 464; *McLean v. Macdonald*, 2 Bart. 534; *Lynde v. Estabrook*, 7 Allen, 68; *Fiske v. Cobb*, 6 Gray, 144; *Burbank v. Whitney*, 24 Pick. 146; *Allen v. White*, 16 Ala. 181.

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The judgment must be reversed, and it must be certified to the probate court for its action in accordance with this opinion. No costs will be allowed to either party.

The other Justices concurred.

WILLARD A. GREEN v. RACHAEL SOLOMON.

Statute of frauds—Agreement to pay debt of another—Novation.

In this case it is held that there was testimony which, if believed by the jury, was sufficient to support the claim of plaintiff that defendant, through her agent, agreed to pay a hotel bill due the plaintiff from a contractor of defendant, and that plaintiff, in reliance upon such agreement, released the original debtor.

Error to Iosco. (Simpson, J.) Argued April 10, 1890. Decided April 18, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

C. R. Henry, for appellant.

M'Cutcheon & Elliott, for plaintiff.

MORSE, J. The plaintiff brought suit in justice's court against the defendant for $57.30, the amount of an hotel bill against one Richard P. Pearson, and recovered judgment. On appeal to the circuit court for the county of Iosco the plaintiff again had judgment.

There was no dispute as to the items or amount of the bill. It was claimed by the plaintiff that at his hotel in Au Sable, in the presence of Pearson and one Selig Solo-

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mon, the husband and agent of defendant, the bill against Pearson was made out and presented; that thereupon Solomon agreed that his wife would pay the debt, and upon such assumption of the debt he released Pearson. It is conceded that Selig Solomon was the agent of defendant, and had authority to bind her.

The defendant claimed that her agent simply promised to pay the Pearson account to Green in case, on settlement between her and Pearson, it was found there was anything due to Pearson from her upon a lumbering contract between them; that, instead of being indebted to Pearson, it was ascertained that he owed her a large amount; therefore she was not obligated to pay the account, and refused to do so. The case was tried before a jury.

The defendant contends, first, that there was no testimony tending to show that plaintiff ever released Pearson, or agreed to do so; that the whole case of the plaintiff shows that Pearson at the hotel gave him an order for the bill on defendant, and that Selig Solomon, coming into the room, agreed for defendant that she would pay it; that it was simply a promise on his part to pay Pearson's debt, and within the statute of frauds.

We think there was testimony, if believed by the jury, sufficient to support the plaintiff's claim. The defendant submitted the following special questions to the jury, which were by them answered in the affirmative:

"1. Did Green, Pearson, and Solomon meet at the Winchester about the 2d of March, 1888, and there make a novation of the debt in question from Pearson to Solomon for Green's benefit?

"2. At the meeting in the Winchester, did Solomon understand that Pearson was to be unconditionally released, and Solomon held for the debt in question?

"3. Was it agreed between Green, Solomon, and Pear-

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son, at the meeting in the Winchester about March 2, 1888, that Pearson was released from the debt in question?

"4. At any time did Solomon, Green, and Pearson meet, and all understand that Pearson was to be released from the debt in question, and Solomon held therefor?"

The defendant insists that there was absolutely no evidence tending to show that plaintiff ever released Pearson from the debt, but plaintiff, in answer to a question whether he afterwards held Pearson for it, testified:

"No, sir; I never looked to him after that."

Enough took place, according to the testimony of plaintiff's witnesses, at the hotel, to warrant the jury in finding that Pearson was there released, and defendant accepted for the debt. Pearson was lumbering under a contract with defendant, and defendant was furnishing him advances and supplies, and was supposed to be owing Pearson at the time. Plaintiff and his clerk, Howard, and Pearson were present. Plaintiff told Howard to hand Pearson his account, which he did. Pearson said: "I will give you an order on Solomon for this." Plaintiff said, "All right." Howard drew this order. About that time Solomon came in, and Howard says, "Here is an order, Mr. Solomon; will you accept it?" who answered: "It is all right; I will pay it. I cannot pay it just at present. I have a large sum of money to pay in a few days." Howard turned to plaintiff, and asked him if that was all right, and plaintiff replied, "Yes; his word is good for it." As plaintiff never looked to Pearson afterwards, it would seem that the understanding and agreement there was plain enough that Solomon should pay the debt, and Pearson be released. It must have been so understood by all. In view of the special findings of the

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jury, the other errors assigned become unimportant, and need not be noticed.

The judgment is affirmed, with costs.

The other Justices concurred.

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MAUD KELLEY, BY HER NEXT FRIEND, LORRAINE K. GIBBS, v. THE DETROIT, LANSING & NORTHERN RAILROAD COMPANY.

Negligence—Hearsay testimony—Opinion evidence.

1. A witness who is asked to state to the jury the *extent* of the sufferings of the plaintiff in a negligence case, based upon his observation, cannot testify to what the plaintiff said to him about her sleeplessness at night, in response to his inquiries made the next morning; the same being hearsay testimony. *Johnson v. McKee*, 27 Mich. 472; *Railroad Co. v. Huntley*, 38 Id. 543; *Mayo v. Wright*, 63 Id. 40.

2. A question calling for the *opinion* of a witness whether an accident happened by reason of the defendant's negligence or of the plaintiff's inattention calls for incompetent testimony. *Evans v. People*, 12 Mich. 34; *Lemon v. Railway Co.*, 59 Id. 618; *Anderson v. Boom Co.*, 61 Id. 489; *Harris v. Clinton Tp.*, 64 Id. 447; *Melzer v. Car Co.*, 76 Id. 94.

So *held*, in a negligence case, where, after a witness for the plaintiff had testified that he saw the plaintiff step from the car steps onto a box placed there for that purpose, and fall, he was asked, on cross-examination, whether it occurred to him, at the time, that the accident happened by reason of the darkness or of the inattention of the plaintiff to a step being there.

3. It is unfair to establish one rule for the plaintiff and another for the defendant in the admission or exclusion of testimony.

So *held*, where, after permitting a witness for the plaintiff to answer a question of doubtful competency, as calling for opinion evidence, the court excluded the answer of a witness for the defendant to practically the same question.

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Error to Kent. (Burch, J.) Argued April 10, 1890. Decided April 18, 1890.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

J. B. Lothrop and *Smith & Stevens*, for appellant.

Rutherford & Houseman, for plaintiff.

CAHILL, J. The plaintiff sued to recover damages for an injury to her left ankle, caused by a fall while alighting from defendant's train at Lakeview station, October 6, 1888.

The declaration is not set out in the printed record, and no point is made upon its sufficiency. It alleges negligence on the part of defendant in failing to provide suitable and safe attendance and appliances for the safety of passengers in alighting from defendant's coach, and charges that defendant stopped its train in the darkness, where no lights were burning, and placed a box step so carelessly,—

"The top or covering projecting over the said box or step in such a manner that, when the plaintiff stepped from said car into the darkness, she stepped upon the projecting edge of said box, by means of which it was overthrown," and plaintiff was injured.

Defective construction of the box step, improperly placing the same, lack of proper assistance by defendant's employés, and lack of artificial light are alleged in the second count.

The plaintiff recovered judgment for $1,000, and the defendant brings error.

Four errors are assigned on the admission or exclusion of testimony. Upon the trial the plaintiff called as a witness Abram Kelley, who testified as follows:

"The plaintiff is my niece. She visited me at Lake-

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view about a year ago, arriving there on October 6. I was at the defendant's depot to meet her. When the train arrived, I walked down to assist her. She stepped down on the box step, and fell to the sidewalk. My impression is that the train was a little late. We stayed at the depot quite a spell before it came. There were freight-cars standing on the side track, about opposite where the car step was. There was no light outside of the car, nor any about the depot, that reflected on the steps. It was not really awful dark, and it was not very light. It was between light and dark; sort of twilight. It was a little too dark to distinguish everything at the station between those two trains of cars where she alighted. She was taken to my house. Her ankle was swollen considerably. She was at my house four weeks, and had to go on crutches while there."

Plaintiff's counsel then asked witness the following question:

"Tell the jury the extent of her suffering, so far as it came under your observation."

Witness said:

"I know that every morning I asked her how she rested."

Whereupon counsel for defendant objected to the witness testifying to statements made by the plaintiff in answer to such questions of the witness, as being hearsay and incompetent. The objection was overruled, and defendant's counsel excepted. The witness continued:

"She said she didn't rest well for quite a good many nights; that she would have to be up in the night,—that is, we had a bowl of water set so she could bathe her ankle."

Upon the admission of this evidence the first error is assigned. Defendant's counsel do not question the rule that expressions or exclamations of *present* bodily pain are competent evidence, but it is claimed that this evidence does not come within the rule, because the statements did not indicate *present* bodily feeling, but were

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narrations of past transactions, and were made in answer to questions put to her by the witness. The admission of this testimony was error. The witness was asked to tell the jury the extent of her suffering, so far as it came under his observation. This was a proper inquiry, and it could have been properly answered by any testimony which tended to show that the plaintiff was wakeful, restless, or showed other indications of being in pain. But we do not think it was within the rule for the witness to testify to what the plaintiff said to him about her sleeplessness, in response to his inquiries. Such statements made in the morning after the sleepless nights were narrations of past transactions, and the testimony received was hearsay. *Johnson v. McKee*, 27 Mich. 472; *Grand Rapids, etc., Railroad Co. v. Huntley*, 38 Id. 543; *Mayo v. Wright*, 63 Id. 40 (29 N. W. Rep. 834).[1]

The second error is assigned upon the refusal of the circuit judge to allow an answer to the following question asked of the witness Gilleo, on cross-examination, by defendant's counsel:

"At the time of the accident, did it occur to you that the accident happened by reason of the darkness? Whether it occurred to your mind that the accident happened by reason of the darkness or by reason of the inattention of Miss Kelley to a step being there?"

We think this testimony was properly excluded. The questions called for the opinion of the witnesses upon a question which the jury were to pass upon, viz., whether the accident happened by reason of the defendant's negligence or by reason of the plaintiff's inattention. This witness had testified that he was at the depot on the night of the accident, and saw the plaintiff descending from the car steps to the box, and saw her fall. Any

[1] Cited by counsel for appellant, and also by plaintiff's counsel (except the last case), who also cited *Hyatt v. Adams*, 16 Mich. 180; *Elliott v. Van Buren*, 33 Id. 49.

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opinion that he could have must have been formed at the time, and we do not think it was competent for him to give his opinion. He was allowed to state the facts about the transaction fully. From these facts, and not from his opinion based upon them, the jury should find their verdict. *Evans v. People*, 12 Mich. 34; *Lemon v. Railway Co.*, 59 Id. 618 (26 N. W. Rep. 791); *Anderson v. Boom Co.*, 61 Id. 489 (28 N. W. Rep. 518); *Harris v. Clinton Tp.*, 64 Id. 447 (31 N. W. Rep. 425); *Melzer v. Car Co.*, 76 Id. 94 (42 N. W. Rep. 1078).

The third and fourth assignments of error are based upon the refusal of the circuit judge to allow defendant's counsel to ask Merritt Staples, a witness called by the defense, the following questions:

"With reference to the light,—the amount of light at that time,—will you state whether in your judgment a person coming down the car steps, whether it was light enough for them, if they had looked, to see a box of that kind?"

"Will you state whether or not a person coming down the car steps, if they had looked, they could have seen the box or not?"

We think the exclusion of the first question, at least, was error. Plaintiff's counsel had been permitted to ask his witness Gilleo the following question:

"*Q.* As to whether or not a person alighting from a car would be able in your judgment to distinguish a small object sitting down on the ground as well as if it was daylight.

"*A.* No, sir."

This was practically the same question which under his objection the court refused to allow defendant's counsel to ask his witness. Whether either of these questions was strictly competent, even under the very liberal rules permitted by this Court in *Evans v. People*, 12 Mich. 35; *People v. Post & Tribune Co.*, 54 Id. 465 (20 N. W. Rep.

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531); *Laughlin v. Railway Co.*, 62 Id. 226 (28 N. W. Rep. 875); *Kelley v. Richardson*, 69 Id. 436 (37 N. W. Rep. 516),—may admit of some question, but it would be very unfair to establish one rule for the plaintiff, and another for the defendant.

For the errors pointed out the judgment must be reversed, and a new trial granted, with costs of this Court.

The other Justices concurred.

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THE FIRST NATIONAL BANK OF DETROIT v. GEORGE A. BURCH, PRINCIPAL DEFENDANT, AND THE SUPREME SITTING OF THE ORDER OF THE IRON HALL, GARNISHEE DEFENDANT.

[See 76 Mich. 608.]

Garnishment—Foreign corporations—Service—Comity of states.

1. The mode of service of garnishee process upon foreign corporations is absolutely within the discretion of the Legislature; and their right to do business in this State is dependent upon a compliance with Act No. 266, Laws of 1889, which authorizes such service to be made upon any officer or agent of the corporation found within this State, whether here upon corporate business or not.
2. A disclosure made and filed by a recognized agent of a foreign corporation, after service of garnishee process under Act No. 266, Laws of 1889, admitting the liability of the principal, is binding upon the corporation.
3. The fact that a foreign corporation is exempt from process of garnishment under the laws of its home state will not exempt it from such process when doing business in this State.

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Error to Wayne. (Reilly, J.) Argued April 10, 1890. Decided April 18, 1890.

Garnishment proceedings. Defendants bring error. Affirmed. The facts are stated in the opinion.

J. W. Donovan, for appellant Burch.

George F. Beasley, for garnishee appellant.

Gray & Gray, for plaintiff.

LONG, J. This is a garnishment proceeding under the statute, and process was served under the provisions of Act No. 266, Laws of 1889, on the deputy supreme justice, an agent of the garnishee defendant at Detroit, this State.

The proceedings were commenced in the Wayne circuit court; and, after the service of process, one Isaac E. Brown, for and in behalf of the garnishee, made the following disclosure:

"The answer and disclosure of Isaac E. Brown, one of the officers and agents of the Supreme Sitting of the Order of the Iron Hall, said garnishee defendant, being duly sworn, says that the garnishee defendant above named is a corporation under the laws of the state of Indiana, and doing business under the laws of the State of Michigan, and that the principal business offices of said order are located at Indianapolis, Ind.

"This defendant further says that he is the supreme trustee, an officer and agent of and for said garnishee defendant in this cause, and is familiar with the facts in relation thereto; and at the time of the service of the garnishee summons in this cause, to wit, October 30, 1889, the said garnishee defendant was indebted to the said principal defendant, George A. Burch, in the sum of, to wit, seven hundred dollars, as near as he can estimate the same, and that it had no other property, moneys, or effects in its hands, or under its control, or within its knowledge, belonging to said principal defendant.

"And this defendant further says that the seven hun-

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dred dollars herein mentioned and disclosed is the same seven hundred dollars heretofore mentioned in three several disclosures made in the justices' courts of Detroit in causes similarly entitled to the suit herein, and that he is informed and believes that the principal defendant herein is a married man, and a householder, and that the indebtedness from the garnishee defendant to the principal defendant is for moneys due upon a certificate of membership held by said principal defendant in said corporation, garnishee defendant, the Supreme Sitting of the Order of the Iron Hall, which corporation, garnishee defendant herein, is a benevolent, charitable, and fraternal association."

The actions against the principal defendant were commenced in justice's court, and, after obtaining judgments there, they were removed to the circuit court of Wayne county, by filing transcripts of such judgments, amounting in all to the sum of $603.34 at the date of the trial of the garnishee proceedings in the circuit court; the proceedings in the present case being upon one of such transcripts, and judgment being taken against the garnishee defendant for the sum of $166.27. The garnishee defendant, as well as the principal defendant, bring the cause to this Court by writ of error; both causes being heard as one. The judgment upon which the garnishee proceeding was commenced is not attacked. The disclosure was filed on November 19, 1889. Plaintiff filed a claim for trial of the statutory issue respecting the garnishee's liability; and on January 8, 1890, judgment was entered in favor of plaintiff for the sum above named.

Only two questions are raised in this Court:

1. That the service of the writ of garnishment is not such a service as is required by the laws of this State.

2. That the funds garnished are charitable, fraternal, benevolent, and beneficiary funds, and, in the hands of a beneficiary society, like the garnishee defendant, are not subject to garnishment or attachment.

The first point is not well taken. The return of the

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officer shows that the process was served on an officer of the corporation within this State. Such service is provided for by Act No. 266, Laws of 1889, which provides that—

"If a foreign corporation, the writ of garnishment may be served upon any officer or agent of the corporation * * * found within this State, whether said officer or agent be in this State upon the business of said corporation or not; and said officer or agent shall make disclosure, and the same shall be considered the answer of the corporation," etc.

The Legislature has thus fixed the mode of service of garnishee process; and the statute, under such service, compels disclosure. This is absolutely within the discretion of the Legislature, and the right of a foreign corporation to do business within this State is dependent upon a compliance with our statute. The service of the process was therefore properly made, and conferred upon the court jurisdiction to hear the case. But the case does not rest here. Mr. Brown, as the recognized agent of the corporation, made and filed the disclosure admitting liability, and the corporation is bound by it.

Under the second objection, it is claimed that the statute of Indiana exempts this garnishee defendant from garnishment, in that it is a benevolent and charitable association. The garnishee defendant was organized under section 2, subd. 5, chap. 281, of the Revised Statutes of Indiana, for the year 1876, as amended by the act of 1881, which conferred upon a certain number of persons the right—

"To organize lodges or other bodies of Masons or Odd-Fellows, according to their respective laws; also, divisions or associations of temperance, or other charitable associations or orders," etc.

Section 1, chap. 4, of the Laws of Indiana, passed in 1877, provides—

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"That all benefits, claims, or interests on account of certificates of membership, policies, or other evidence of interest, in any Masonic, Odd-Fellows, or other benevolent or charitable association, society, or incorporation organized and incorporated under the laws of this state,—*Provided*, such association, society, or incorporation is organized for the purpose of mutual benefit, for benevolent or charitable purposes, or for the purpose of mutual life insurance; *And Provided*, such benefits, claims, or interests are made in favor of the wife, child, or children, or other dependents, of the holder of such certificate, policy, or evidence of interest,—shall be, and are hereby, made exempt from all claims of creditors and all judgments and all other claims against the holder of such certificate, policy, or other evidence of interest. All such benefits, claims, or interest made for the benefit and protection of the wife, child, or children or dependents of parties so insured, or members of such society so organized and incorporated, shall be for the sole use and benefit of the parties named as beneficiaries or payees in the policy or certificate of membership issued by such society, association, or incorporation," etc.

Counsel may be correct in the conclusion that under these statutes the fund held by the garnishee defendant is exempt from process of garnishment in the state of Indiana. Upon that question we express no opinion. It is a question purely for that jurisdiction. But the statute has no extraterritorial force. When a foreign corporation comes within this State, and seeks to carry on its business here, it must do so in compliance with our laws. A corporation created by a state is a mere creation of local law. Even the recognition of its existence by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation, or the exercise of its powers, is prejudicial to their interests, or repugnant to their policy. *Home Insurance Co. v. Davis*, 29 Mich. 238; *Hartford Fire Insurance Co. v. Raymond*, 70 Id. 485 (38 N. W. Rep.

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474). By the express terms of the garnishee law of this State, any corporation, domestic or foreign, other than municipal, may be garnished. Act No. 266, Laws of 1889. If we should apply the statute of Indiana above cited, and exempt the funds in the hands of this garnishee defendant because exempted under the laws of the state of Indiana, it would be putting a foreign corporation upon a better footing in this State than our own domestic corporations. We have no statute in this State exempting such funds.

It has been repeatedly held, and there seems to be no conflict of authority, that the corporations of one state have no right to exercise their franchises in another state except upon the assent of such other state, and upon such terms as may be imposed by the state where the business is to be done. The conditions imposed may be reasonable or unreasonable. They are absolutely within the discretion of the Legislature. *Hartford Fire Insurance Co. v. Raymond, supra,* and cases there cited.

It follows that the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

WILLIAM WILSON v. WILLIAM ATKIN, COMMISSIONER OF HIGHWAYS, AND JAMES SPEARS, CLERK, OF THE TOWNSHIP OF ARBELA.

Highways—Hearing of application to lay out—Adjournment—Jurisdiction.

The power of a commissioner of highways to adjourn the hearing of an application to lay out a highway is limited to twenty

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days by How. Stat. § 1300, and a longer adjournment ousts him of jurisdiction.

Certiorari to review proceedings for laying out a highway. Argued April 10, 1890. Proceedings quashed April 18, 1890. The facts are stated in the opinion.

Wood & Joslin, for petitioner.

Huston & Spears, for respondents.

GRANT, J. A petition was presented to the defendant Atkin to lay out a highway in his township. He gave notice fixing the time of hearing for August 20, 1889. On the day of hearing he adjourned it to September 7, and on September 7 he again adjourned to September 21.

How. Stat. § 1300, provides that the highway commissioner may adjourn the hearing from time to time, not to exceed 20 days. The commissioner, by his adjournments beyond the time fixed by statute, lost jurisdiction. His action, therefore, in laying out the highway, was null and void.

The proceedings must be quashed. There is nothing in the record to indicate that the respondents did not act in good faith, and no costs will be allowed.

The other Justices concurred.

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MYRA HARRIS ET AL. v. BENJAMIN CREVELING AND SARAH HERRICK.

Mortgage—Foreclosure by advertisement—Sale—Verbal agreement for reduction of rate of interest.

1. "Occupancy," within the meaning of How. Stat. § 8503, authorizing the sale together, on a mortgage foreclosure by advertisement, of separate lots occupied as one parcel, does not require that *all* of the land be fenced or improved. The actual inclosure of part carries with it the occupancy of the remainder, which is used, or intended to be used, as part of one farm.
2. A complainant, who claims that a mortgage sale by advertisement is void because separate lots were sold in one parcel, has the burden of proof to show that they were *not* occupied as one parcel; and it is not sufficient to show that part of one lot was fenced and cultivated, and that the adjoining lot was unfenced.
3. A verbal agreement for the reduction of the rate of interest stipulated for in a written instrument is invalid. *Tousey v. Moore*, 79 Mich. 564.

Appeal from Ottawa. (Arnold, J.) Argued April 9 and 10, 1890. Decided April 18, 1890.

Bill to set aside certain foreclosure proceedings by advertisement, and for other relief. Complainants' appeal from decree dismissing bill. Decree affirmed. The facts are stated in the opinion.

Frank L. Carpenter, for complainants, contended:

1. The trust imposed by the assignment to Israel V. Harris, for the benefit of the creditors of Myron Harris, having been fully discharged, the omission of the lots in suit from the reconveyance to Myron Harris is unimportant, the legal estate vesting in him without such a reconveyance; citing How. Stat. § 5585; *Steevens v. Earles*, 25 Mich. 40; *Detroit v. Railroad Co.*, 23 Id. 215; *Toms v. Williams*, 41 Id. 552, 566.
2. In support of the claim that the foreclosure by Creveling was

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void, because the mortgaged lots were not sold separately, counsel cited How. Stat. §§ 8503, 8507; *Lee v. Mason*, 10 Mich. 403; *Udell v. Kahn*, 31 Id. 195; *Grover v. Fox*, 36 Id. 461; *Clark v. Stilson*, Id. 482; *Durm v. Fish*, 46 Id. 312; *Snyder v. Hemmingway*, 47 Id. 549; *Baldwin v. Cullen*, 51 Id. 33.

3. As to the effect of an administrator's trafficking in the funds and property of the estate for his own benefit, counsel cited How. Stat. § 6042; *Hoffman v. Harrington*, 28 Mich. 90; *Sheldon v. Rice Estate*, 30 Id. 296; *Pierce v. Holzer*, 65 Id. 263; *McKay v. Williams*, 67 Id. 547.

More & Wilson, for the defendants, contended for the doctrine stated in the opinion.

GRANT, J. Israel V. Harris, Myron Harris, and Miriam, the wife of Myron, executed a mortgage, October 8, 1874, to defendant Creveling, on two pieces of land, known as "Lots One and Two of Section 34," to secure the payment of a note for $1,000 made by Israel V. and Myron Harris. The lots were contiguous, and bordered upon Grand river upon the south. There was a road upon the west side of lot 2, and one upon the north side of both lots. One lot contained 45 acres; the other, 58. Part of lot 1 had been cleared, fenced, and was used for farming. The remainder of the lots was open common, from which the timber had been, mainly, cut.

January 27, 1862, Myron Harris made an assignment of all of his property, real and personal, to Israel, for the benefit of his creditors. Myron deeded the land in dispute to his wife, May 1, 1880. August 3, 1874, Israel reconveyed certain other lands to Myron, and the deed contained the following recital:

"The object of this quitclaim and release being to reinvest said Myron Harris with the title to said lands,—he having, by deed of trust, recorded in Liber S. of Deeds, at page 263, conveyed said lands to the first party heretofore, for the benefit of creditors; the trust hereby imposed having been fully discharged."

This deed was duly recorded. It did not include lots

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1 and 2. Myron Harris died September 1, 1880, testate, and Israel was the executor. Miriam Harris died intestate September 14, 1880, and Israel was appointed administrator. These lots were inventoried by Israel among the assets of Miriam's estate. Israel died October 17, 1886, without filing any account as administrator or executor.

July 5, 1881, defendant Creveling commenced to foreclose by advertisement. The sale took place November 1, 1881. The lands were sold in one parcel, and were bid in by Creveling for $1,245; that being the amount claimed to be due. The value of the premises was about $1,500. The deed was filed, and became operative November 1, 1882. November 30, 1883, Creveling made a written contract with Israel to sell him the land for $1,125.55; Israel at the same time paying him the difference between that sum and the actual cost of the lots to Creveling, including interest, taxes, etc. October 15, 1886, Israel assigned said contract to defendant Herrick, in consideration of services rendered him as nurse, and expenditures made for his benefit.

Complainants, by their next friend, Mr. Carpenter, filed this bill August 1, 1887, claiming that the sale was void because the premises were sold in one parcel; that Creveling and Israel fraudulently combined to secure a foreclosure, and vest the title in Israel; that the sale was for a larger amount than was due; that Israel used the money of the estate of Myron to make the payments upon the contract; that defendant Herrick fraudulently procured an assignment of the land contract from Israel; and that she holds it in trust for complainants. Answers were filed denying all the material allegations in the bill, except that the lots were sold as one parcel. Proofs were then taken in open court, and decree rendered dismissing the bill; and complainants appeal.

1. There is no evidence of fraud or collusion between

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Creveling and Israel Harris in connection with the foreclosure proceedings. The mortgage and note were long past due when Creveling commenced to foreclose. No conversation occurred between them in regard to the matter until two years after the sale, when Creveling contracted to sell to Israel. If the payment by Israel was made out of the estate of Myron or Miriam, this would not affect Creveling's title, and this is the only circumstance in the record upon which to base a charge of fraud against him.

2. The claim that the sale was for more than was due is not sustained by the evidence. This depends upon the fact as to whether or not there was a valid agreement to reduce the rate of interest from 10 to 7 per cent. Two witnesses testified on this point. Mr. Carpenter—the guardian, next friend, and solicitor for complainants—testified that he made such an arrangement with Creveling. Creveling denies it. The learned circuit judge saw the witnesses upon the stand, and was in a much better position to determine where the truth lay, or whether complainants had a preponderance of the evidence, than are we. We will not, therefore, question the correctness of his finding in this respect. But the fatal objections to this claim are:

1. It was a mere naked promise on the part of Creveling, without any consideration.
2. It rests entirely in parol. *Tousey v. Moore*, 79 Mich. 564.

3. The evidence fails to show that the sale was void because the lots were sold as one parcel. The burden of proof was on the complainants. They did not establish the fact that the lots were *not* occupied, and intended to be used, as one farm. The statute (How. Stat. § 8503) governing the sale of mortgaged premises has been frequently interpreted by this Court, and it is unnecessary

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to discuss it here. "Occupancy," within the meaning of the statute, does not require that all the land be fenced or improved. The actual inclosure of part carries with it the occupancy of the balance, which is used, or intended to be used, as part of one farm. There was nothing to show that lot 2 had not been used to supply wood and timber for use upon the farm for fuel, fences, and buildings, or that the buildings erected on lot 1 were not of sufficient size for a farm comprising both lots. The lots were so situated as naturally to constitute one farm. It is not sufficient, to invalidate a foreclosure sale, to show that part of one lot was fenced and cultivated, and that the adjoining lot was unfenced.

4. There was no evidence that defendant Herrick obtained the contract from Israel Harris by undue influence or fraud. On the contrary, she paid a valid and valuable consideration therefor. She had no knowledge that Isreal had made any payments to Creveling upon the contract out of the funds of the estates of either Myron or Miriam. The title of both Israel and of complainants had been cut off by the foreclosure sale and deed. As affecting the title of the defendant Herrick, the records of the deed from Israel to Myron, and of Myron to Miriam, were wholly immaterial. They do not in any manner affect the validity of her title. She was a purchaser in good faith.

The decree of the circuit court must be affirmed, with costs.

MORSE, LONG, and CAHILL, JJ., concurred. CHAMPLIN, C. J., did not sit.

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EDWARD PHILLIPS v. JUDSON FREYER, DEFENDANT, AND JAMES D. CHAMPION AND MAJOR D. HAYWARD, OWNERS OF ATTACHED PROPERTY.

Log-lien law—Common-law lien—Waiver—Contracts.

1. The language of section 1, Act No. 229, Laws of 1887, giving any person who performs any labor or services in manufacturing lumber a lien thereon for the amount due for such labor or services, is free from ambiguity, and gives such lien to the owner of a saw-mill who manufactures lumber under a sawing contract; and the fact that such mill-owner has a lien at common law is of no consequence in the face of this provision.
2. The common-law lien of a mill owner upon lumber manufactured under a sawing contract is waived by the commencement of an attachment suit to enforce the statutory lien given him by Act No. 229, Laws of 1887.
3. *Kieldsen v. Wilson*, 77 Mich. 45, in so far as it holds that Act No. 229, Laws of 1887, does not apply to the case of a contractor who performs no *personal* labor under the contract, is overruled, and the Court adheres to the rule laid down in *Shaw v. Bradley*, 59 Mich. 199.

Error to Newaygo. (Palmer, J.) Argued April 11, 1890. Decided April 18, 1890.

Lumber-lien suit. Defendant lumber-owners bring error. Affirmed. The facts are stated in the opinion

John Harwood, for appellants, contended:

1. Such statutes as the one under which the plaintiff claims the right to recover in this case must be strictly construed, and cannot be held to include persons not clearly within the statutory language and intent, and the evils sought to be remedied; citing *Clark v. Adams*, 33 Mich. 159; *Woodruff v. Ives*, 34 Id. 320.
2. Plaintiff first elected to maintain his common-law lien, and to that end retained possession of the lumber, and gave notice of his intention to retain *that* lien. He must therefore fail in his

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attempt to enforce the statutory lien, even if such right once existed; citing *Thompson v. Howard*, 31 Mich. 309; *Detroit v. Paving Co.*, 38 Id. 358; *Nield v. Burton*, 49 Id. 53.

3. But the statute was designed solely for the benefit of laborers who had not the sole possession of the property upon which they had expended their labor, and who therefore had no remedy against the property until given them by the statute which was not designed to protect mill-owners and manufacturers of lumber, who had the right to retain possession of the lumber until their claims were paid; citing 2 Kent, Com. 635.

A. G. Day, for plaintiff, contended:

1. Even if plaintiff had a common-law lien, he could only enforce it by manual possession, or by suit against trespassers. He could not sell the property for the purpose of getting his pay.
2. But plaintiff was a contractor to saw lumber, at specified rates, and entitled to a lien under Act No. 229, Laws of 1887; citing *Shaw v. Bradley*, 59 Mich. 199. Having paid the labor claims, he ought to be entitled to the statutory lien without a formal assignment of such claims.

GRANT, J. Plaintiff owned a saw-mill, and carried on the business of manufacturing lumber for other parties. Defendant Freyer contracted with the plaintiff to saw a certain amount of logs for him at an agreed price per 1,000 feet. Plaintiff manufactured the logs into lumber, and piled it in his own yard. Freyer sold the lumber to defendants Champion and Hayward while it was in plaintiff's possession, in his mill-yard. Plaintiff was not paid for sawing the logs, and thereupon filed a statement of lien under Act No. 229, Laws of 1887. He commenced an attachment suit in accordance with the provisions of this act, attaching a portion of the lumber to secure his lien. The defendants were all duly served with process. They appeared, gave a bond to release the property, and the case was tried upon the plea of the general issue.

The principal contention of defendants is that Act No. 229 does not apply to manufacturers who retain posses-

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sion of the property upon which they perform labor, and who have a common-law lien. The statute reads as follows:

"Any person or persons who perform any labor or services in manufacturing lumber * * * shall have a lien thereon for the amount due for such labor or services."

This language is entirely free from ambiguity. It expressly gives a lien for manufacturing. There is nothing in the statute showing any intention of the Legislature to limit it to laborers who were not entitled to retain possession, and who had no lien until one was created by statute. The fact that plaintiff had a lien at the common law is of no consequence in the face of this plain provision. It is entirely competent for the Legislature to provide an additional remedy to one already existing.

We are aware that there is a conflict between the cases of *Shaw v. Bradley*, 59 Mich. 199 (26 N. W. Rep. 331); and *Kieldsen v. Wilson*, 77 Id. 45 (43 N. W. Rep. 1054). But we adhere to the rule laid down in *Shaw v. Bradley*, and overrule *Kieldsen v. Wilson*.

In his statement of lien, plaintiff uses this language:

"But I do not release my lien for said saw bill, which I have by virtue of my possession of said property, by filing this statement of lien."

Defendants contend that by this he waived his statutory lien. It might well be urged that he waived his common-law lien by filing this statement under the statute; but he cannot be held to have waived his statutory lien, which he was then taking steps to enforce. When he commenced his suit by attachment, he clearly waived his common-law lien. He then gave up his possession, and voluntarily placed the property in the possession of the sheriff. Defendants then obtained the right, which they

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had not before possessed, to gain possession of the property by giving the statutory bond.

Judgment affirmed, with costs.

The other Justices concurred.

JOHN PIEOTTER AND FERDINAND PIEOTTER v. CHARLES E. WHALEY ET AL.

Drain taxes—Irregularities in assessment—Resident lands.

1. How. Stat. § 1007, provides that all resident real estate shall be assessed to the person occupying it on the second Monday of May, unless the same shall be given in by some other person for assessment to him, and an assessment contrary to such provision is void.
2. In this case a deed issued by the Auditor General for drain taxes is set aside for defects in the proceedings of the drain commissioner.

Appeal from Lenawee. (Lane, J.) Argued April 11, 1890. Decided April 18, 1890.

Bill to set aside a tax deed issued on a sale for drain taxes. Defendants appeal. Affirmed. The facts are stated in the opinion.

Henry C. Smith, for complainants.

Westerman & Westerman, for defendants.

LONG, J. The bill in this cause was filed to set aside a tax deed of lands situate in the township of Deerfield, Lenawee county. The deed was made under the provisions of Act No. 229, Laws of 1881, as amended by Act No.

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7, Laws of 1882, for drain taxes assessed upon said lands for the years 1877, and 1878, 1879. The deed was made by the Auditor General to George E. Whaley, now deceased, and the defendants are his heirs at law. The lands were bid in under this sale by George E. Whaley for the sum of $14, and the tax-deed was executed November 24, 1884. It appears that the lands are of the value of $4,000.

The complainants are in possession, holding the original title. The claim made by the bill is that the drain commissioner acquired no jurisdiction to make the assessment of such drain taxes for said years, and the proceedings for the levy by the drain commissioner of such taxes are fully set out in the record. The defendants answered the bill of complaint, the cause was put at issue by the filing of replication, and proofs were taken in open court. On the hearing, the court below made a decree setting aside the tax deed as a cloud upon the title of complainants, and also ordered and decreed that the certificate of tax sale made by the county treasurer for those years be set aside, and declared the taxes assessed for the years 1877, 1878, and 1879 void, as against complainants. Defendants appeal.

The petition for the establishment of the drain, and all the proceedings of the drain commissioner thereunder, are fully set out in the record. The errors appearing in these proceedings are almost too numerous to mention. Scarcely a step taken by the commissioner in the laying out and establishment of the drain is in accordance with the statute authorizing such action. The drain is called the "Swamp Raisin Drain," extending through the townships of Deerfield and Blissfield, Lenawee county. The petition was addressed to the county drain commissioner, and the return of his proceedings was put in evidence. It does not appear that he ever signed the certificate of his pro-

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ceedings. It does not appear from his proceedings that any notice was ever given by him of the assessment, or an opportunity given to review his proceedings therefor. He does not state on what date he examined the lands to determine the necessity for such drain, nor the date when he determined that such drain was necessary. He states, however, that, in pursuance of such determination,—

"I proceeded on the ——— day of ——— A. D. 187—, to try to obtain a release of the right of way and other damages from every person through whose lands such drain was designed to pass, and I obtained the release of the right of way upon the lands of ———, but could not obtain such release in a reasonable time from ———, they being persons who were owners of lands through which said contemplated drain now passes."

It is quite apparent that the drain commissioner had taken a printed blank form for a certificate of his proceedings; had filled out the first part of it, leaving all other blank spaces unfilled; and filed the same as his return of proceedings, and without his signature thereto. It does not show that he ever obtained a release of right of way over the premises in question, or ever gave the persons owning or in possession thereof any notice of his intended action. No jury or commissioners are shown to have been called, and no apportionment of the costs and expenses made. Many other errors might be pointed out, going to the jurisdiction of the commissioner to make a valid assessment.

Some claim is made by counsel for defendants that the lands were sold for several items of other taxes aside from drain taxes. It appears, however, from the assessment roll put in evidence, that for the year 1887 the drain tax was $100, for the year 1878 the drain tax was $9.55, and for the year 1879 the drain tax was $63.45,

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and there is sufficient showing that the other taxes were paid.

Another error is pointed out which would affect the whole tax, even if the other taxes had not been paid. The lands for the years 1877 and 1878 were occupied and claimed to be owned by Mr. Merritt Cogswell, and in the year 1879 by the complainants, and yet the tax appeared upon the assessment roll as against R. S. Cogswell, who at that time lived in the state of Tennessee, and had no interest in the premises. This appeared under the head of resident lands. How. Stat. § 1007, provides that all resident real estate shall be assessed to the person occupying it on the second Monday of May, unless the same shall be given in by some other person for assessment to him. It appears from the testimony of the supervisor for those years that he knew that R. S. Cogswell at that time resided in the state of Tennessee. The tax was therefore invalid for the reasons pointed out in *Tweed v. Metcalf*, 4 Mich. 586, and *Burroughs v. Goff*, 64 Id. 468 (31 N. W. Rep. 273). We are satisfied that the tax cannot be upheld for any of these years.

The decree of the court below must be affirmed, with costs.

The other Justices concurred.

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CHRISTIAN BOICK v. EDWARD W. BISSELL.

Negligence—Driving in highway—Evidence.

1. Where the plaintiff's testimony in a negligence case shows that there was a clear space on a planked drive-way of at least 14 feet

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outside of that occupied by the plaintiff's wagon in which the driver of defendant's team might have passed, leaving from 6 to 8 feet space between his load and the plaintiff, who was standing beside his wagon with his back towards such open space,—both parties having a right to be in such drive-way,—it is for the jury to say whether such driver exercised ordinary care and prudence in driving within 6 to 12 inches of plaintiff's wagon, he at the time sitting on his load, consisting of from 40 to 50 bags of clover seed, and the hind wheel of his truck catching plaintiff's foot and throwing him between the vehicles, and severely injuring both of his legs.

2. In such a case the reputation of defendant's driver as a careful driver is not in issue, and is immaterial. *Williams v. Edmunds*, 75 Mich. 92.

3. It is competent to show that plaintiff was loading his wagon in the customary way in such drive-way, and that defendant's driver knew what the customary way of loading was there, as affecting the question of his negligence in driving as close as he did to plaintiff's wagon.

Error to Wayne. (Gartner, J.) Argued April 11, 1890. Decided April 18, 1890.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Corliss, Andrus & Leete, for appellant, contended for the doctrine stated in the opinion.

Henry M. Duffield, for defendant, contended:

1. It has been held by this Court that there is no presumption of negligence in not turning out to avoid a collision, but that negligence must be proved; citing *LeBaron v. Joslin*, 41 Mich. 313; *Joslin v. LeBaron*, 44 Id. 160.

2. The case at bar is fully covered by *Daniels v. Clegg*, 28 Mich. 32.

MORSE, J. This is an action to recover damages for personal injuries to plaintiff alleged to have been received through the negligent driving of defendant's servant. The circuit judge directed a verdict for the defendant. This was error. The case should have been sub-

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mitted to the jury upon the question of the negligence of defendant's driver, and also as to the contributory negligence of plaintiff. No testimony was offered on the part of the defendant. The facts, as shown by the plaintiff and his witnesses, were substantially as follows:

The plaintiff, a teamster, was hauling lumber on December 17, 1887, from the depot of the Detroit, Grand Haven & Milwaukee Railway Company, at Detroit. Teams go in and out from the depot in a drive-way from Atwater street. The drive-way is about 25 feet wide from the platform of the freight sheds at the depot to the car tracks. The north side of the drive-way, adjacent to the tracks, is devoted to the loading of freight directly from the cars. The plaintiff drove his wagon to the north side of the drive-way, occupying a space of from five to eight feet of the same, and was loading lumber from the cars upon his wagon, which was about five feet wide. He had put on a small load of lumber, and was engaged in binding his load at the time of the injury. His horses were facing to the west, and he stood between the hind and forward wheels, winding the chain around the wagon reach, or using the chain for the purpose of tightening and securing his load, at the time he was hurt. He came around from the front of his horses to bind the load, and, as he so came around, saw the defendant's team coming.

Bissell's team was drawing a heavy freight truck, loaded with from 40 to 50 bags of clover seed, weighing about 180 pounds each. The driver sat upon the top of the load, and in front. This truck was loaded upon the other side of the drive-way, from 75 to 150 feet away from plaintiff, and while loading the team was faced to the east. When the load was completed, the driver turned his horses around, and drove out past plaintiff. Defendant's team was 10 or 12 feet east from plaintiff's wagon when

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he first saw it. He stood, as it passed, with his face to his own wagon, and his back to defendant's truck, and within two or three feet of his wagon, and was stooping over, or bending forward, engaged in tying his chain or in binding his load. There was plenty of room for Bissell's team to pass without injuring plaintiff, and it would have done so, as plaintiff claims, if the driver had not swerved from his course in towards the plaintiff. His foot was caught by the hind wheel, and he was thrown down between the vehicles, severely injuring both legs. The truck of defendant was not over eight feet wide. The hind wheels were six inches wider than the forward wheels. The plaintiff testified that if defendant's driver had driven in a straight line from where he first saw him he would not have touched him. He was asked if he had so driven how far the truck wheels would have come from his feet. He was not allowed to answer the question, which was a proper one. It was shown that the track of the truck wheels passed within from 6 to 12 inches of plaintiff's wagon. The drive-way was planked its whole width, and there were no obstacles in the way of Bissell's driver except plaintiff and his wagon.

The circuit judge, in his charge to the jury, stated that the defendant's driver "might have left more space between himself and plaintiff's team." This is also evident from the testimony. The circuit judge further said the defendant's driver—

"Might have seen him [plaintiff], and he might not have seen him. There is no evidence here that he did see him, or that he drove faster than men usually drive in that drive-way, or that he drove in any other way, or in any other manner, than a careful and prudent person would drive. To my mind there is no evidence in this case upon which you could find negligence on the part of the driver."

From all the testimony, it appears that there was a

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clear space of at least 14 feet outside of the plaintiff, in which the defendant's driver might have passed, leaving from 6 to 8 feet between his load and plaintiff. The plaintiff had a right to be in the drive-way, and was using no more space than he was entitled to. The driver of Bissell's wagon was bound by the law to notice plaintiff's wagon, and to use all due diligence and care in passing, so as not to injure him. It was for the jury to say, under the circumstances, whether driving within from 6 to 12 inches of plaintiff's wagon was ordinary care and prudence, considering the character of his load, and where the driver sat upon it. If his position was such that he could not look down and see where his wheels were going, it was the driver's duty to take space enough to prevent collision, as long as the space was to be had. If he did not wish, for any reason, to take this space, it was his duty to keep his eyes out to see whether or not he was going to run against or over plaintiff. If, under the circumstances, he had collided with plaintiff's wagon or team, his negligence would have been apparent. As it is, his negligence is a question to be properly decided by a jury.

It is claimed by defendant's counsel that the plaintiff must have thrown out his foot after the forward wheels of defendant's truck had passed, and that such act was negligent. Whether he did so throw out his foot, or whether it was negligence to do so, is also for the jury. When there was plenty of room for defendant's wagon to pass without touching the plaintiff, and it was at noonday, and when, as plaintiff says, if the driver had kept on in a straight course, as he was driving, he would not have struck plaintiff, it was for the jury to say whether or not it was negligence in the plaintiff to turn his back to the roadway, relying upon the course of the defendant's wagon as headed, and upon the fact that there was

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plenty of room in which to pass him without collision.

The reputation of defendant's driver as a careful driver was not in issue, and was immaterial. *Williams v. Edmunds*, 75 Mich. 92.

It was competent to show that plaintiff was loading his wagon in the customary way in such drive-way, and that defendant's driver knew what the customary way of loading was there, as affecting the question of his negligence in driving as close as he did to plaintiff's wagon.

The judgment is reversed, and a new trial granted, with costs.

The other Justices concurred.

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THE PEOPLE, EX REL. GEORGE W. BENNETT, v. THOMAS BENFIELD.

Public officers—Bonds—Failure of sureties to justify—Township drain commissioner—Vacancy—Appointment by township board.

1. The failure of the sureties upon a township drain commissioner's bond to justify, pursuant to Act No. 179, Laws of 1885, does not necessarily create a vacancy in the office, said bond having been approved and the proper oath of office having been filed.
2. The office of a township drain commissioner, who has exercised his duties for a year and a half without question, under the oath of office and bond filed by him, cannot be declared vacant by the township board on account of the failure of his sureties to justify, without notice to such officer, and an opportunity to file a new bond with the proper justification. *McGregor v. Supervisors*, 37 Mich. 388.
3. The following propositions are summarized from the opinion of Mr. Justice MORSE:

   a—Act No. 179, Laws of 1885, requiring sureties upon official

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bonds to justify, does not, in terms, make such justification a condition precedent to the entry of the principal upon the discharge of the duties of his office.

c—The courts generally hold that, even though the statute expressly provides that upon a failure to give a bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment, the default is a ground for forfeiture only, and not a forfeiture *ipso facto*, and that if, notwithstanding such default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title *de jure*, having relation back to the time of his election or appointment. Mechem, Pub. Off. § 266.

Quo warranto. Argued April 11, 1890. Decided April 18, 1890.

Proceedings by *quo warranto* to test the right of the respondent to hold the office of township drain commissioner. Elective term of relator having expired, he recovers a judgment for costs only. The facts are stated in the opinion.

L. R. Peirson and *Grant Fellows*, for relator.

Watts & Smith, for respondent.

MORSE, J. Bennett was duly elected township drain commissioner of the township of Hudson at the annual township meeting in April, 1888. His term was for two years. Five days after the election, he filed with the township clerk a bond, correct in form, as required by law, in the penal sum of $1,000, with two sureties, which bond was approved by the supervisor. He also filed the oath of office required by the Constitution of this State. He continued to hold and exercise the office until September 17, 1889. On the last-named day the township board, without any notice to him, declared the office of township drain commissioner vacant, and on the same day appointed the respondent such commissioner, to fill such

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vacancy, who thereupon took possession of the office, and acted as such commissioner. September 27, 1889, the Attorney General instituted proceedings in this Court, by *quo warranto*, upon the relation of Bennett, to test the title of respondent to the office.

The case is here, issue being joined upon plea and replication; and, although the term for which relator was elected has expired, we consider the question raised of sufficient public importance to be entertained and passed upon.

Issue was joined in time to notice the case for the January term, 1890, of this Court, and it was upon the calendar for that term. No objection was made to the entertaining of the proceedings in this Court until the day of argument; and we shall, therefore, consider the case as if none had ever been made, as the objection only relates to the propriety of the proceedings being instituted in the circuit court, rather than here. While that court, as we have before intimated in other cases of like nature, would have been a more appropriate tribunal to determine the right of relator to the office, still this Court has jurisdiction in the case, and, under the circumstances, will exercise it.

The bond filed by the relator and approved by the supervisor did not have indorsed upon it any justification of the sureties, as provided by Act No. 179, Laws of 1885. This statute provides that—

"No bond required by law to be signed by surety or sureties shall hereafter be received and accepted or approved by any officer or other person or board, whose duty it is or may be to accept or approve of any such bond, unless the surety or sureties signing such bond shall first have justified their pecuniary responsibility, under their signature, in writing, indorsed on said bond or attached theteto."

Such justification must, in the aggregate, equal the

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penal sum of the bond, and show that the sureties are worth, in unincumbered property not exempt from execution, such penal sum, after payment of all just debts, claims, and liabilities. The oath of justification must be administered by some person having authority in law to do so; and a person knowingly or willfully making any false statement of his pecuniary responsibility in such justification may be convicted of perjury, and punished therefor.

The last section of the act reads as follows:

"Any person or persons receiving and accepting or approving any such bond without such justification shall be guilty of a misdemeanor, and shall further be liable for all damages that may be sustained or incurred by any person by reason of such defective bond being accepted or approved."

The bond filed by relator shows no attempt of justification of the sureties upon it, nor was any justification attached to it. The respondent claims that, by this failure to comply with the statute, no proper bond was ever filed or approved, and the relator, therefore, never became lawfully invested with the office, and was a usurper from the beginning, and that a vacancy was not in fact created by the township board, but existed from the time of the election, in April, 1888, and the board only exercised a lawful power in filling the vacancy by the appointment of respondent, and that no notice of such proceeding was necessary to relator who had no rights in the premises.

Whenever a vacancy occurs in the office of drain commissioner of a township, it is conceded that it is the duty of the township board to fill it by appointment. Act No. 227, Laws of 1885, chap. 2, § 1. It is also provided by the same section that, before entering upon the duties of his office and within ten days after his election or appointment, such drain commissioner shall take and sub-

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scribe the oath of office prescribed by the Constitution of this State, and file the same with the township clerk.

"He shall also, within the same time, execute and file with such clerk a bond to the township, in the penal sum of one thousand dollars, with two or more sureties, to be approved by the supervisor or clerk, conditioned upon the faithful discharge of the duties of his office."

We do not think there was necessarily a vacancy in the office. The relator complied with the statute above quoted, and his bond was approved. The statute requiring a justification of the sureties does not, in terms, make such justification a condition precedent to the entering upon the duties of the office by the person duly elected to it; and it seems that the Legislature preferred to punish the person or persons approving a bond without such justification, rather than to work a forfeiture of the office by the failure of such justification.

No doubt, if the relator had been called upon by the township board to file a new bond in conformity with the statute, and had refused or neglected to do so after such notice, he could have been divested of his office by the proper authorities. But the courts generally hold that, even though the statute expressly provides that upon a failure to give a bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment, the default is a ground for forfeiture only, and not a forfeiture *ipso facto*, and that if, notwithstanding this default, the State or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title *de jure*, having relation back to the time of his election or appointment. Mechem, Pub. Off. § 266.

In this case there is no express provision that upon the failure of the statutory justification the office shall be deemed vacant; and the bond given was filed and

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approved in time, and was perfect in every respect except the justification. The bond filed was one capable of enforcement, and neither the failure of justification, nor the approval without such justification, affected its validity as against either the principal or the sureties. *People v. Laning*, 73 Mich. 284.

After the relator had been permitted to exercise the duties of the office to which he was elected for a year and a half, without any question, under the oath and bond filed by him, we are all of the opinion that the office could not be declared vacant without notice to him, and without opportunity to file a new bond with the proper justification. *McGregor v. Supervisors*, 37 Mich. 388.

The relator was unlawfully deprived of his office. The elective term of the same having expired, no judgment of ouster can be entered against the respondent; but the relator is entitled to his costs of this proceeding, and judgment will be entered therefor.

The other Justices concurred.

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AUSTIN W. SHERWOOD AND MANIE SHERWOOD v. DAN. J. ARNOLD, CIRCUIT JUDGE.

Certiorari—Failure to serve bond upon justice—Removal of affidavit from files—Second writ.

1. An affidavit which has been indorsed with an allowance of a writ of *certiorari*, and filed in the clerk's office, and the writ issued, cannot be used as the basis for the allowance of a second writ.

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2. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—A justice of the peace is justified in refusing to make return to a writ of *certiorari*, if the bond is not served upon him within the statutory ten days.

b—The statutory writ of *certiorari* is special, and the proceedings to obtain a review by this process must be strictly complied with.

c—A party has no right to take from the files of the clerk's office an affidavit upon which a writ of *certiorari* has been issued, to present it for a second order of allowance, the statute contemplating that the affidavit shall be presented to the judge or commissioner *before* it is filed in said office.

Mandamus. Submitted April 15, 1890. Granted April 18, 1890.

Relators applied for a *mandamus* to vacate an order requiring a justice of the peace to make a return to a writ of *certiorari*. The facts are stated in the opinion.

H. Hart, for relators.

F. E. Fish, for respondent.

CHAMPLIN, C. J. Peter Caulkett sued relators before a justice of the peace, and the cause was tried on January 17, and judgment rendered in favor of the defendants. On January 18 the plaintiff filed with the justice a written notice of his intention to remove the cause to the circuit court by *certiorari*, and on the same day made the affidavit as foundation for the writ. He presented this affidavit on the same day to the circuit court commissioner, who indorsed thereon his allowance of the writ, and also approved the bond. The plaintiff then on the same day presented the affidavit to the clerk of the circuit court, who filed it and issued the writ. Instead of leaving the affidavit on file in the clerk's office, it was attached to the writ of *certiorari*, and the bond was left with the clerk. On January 20 the plaintiff served the

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writ of *certiorari* upon the justice with the original affidavit attached, and paid him his fees for making return; but did not, in the 10 days allowed by How. Stat. § 7038, serve the bond upon the justice.

On January 30 plaintiff by his attorney went to the justice, and borrowed the writ and affidavit for the purpose of making a copy of the affidavit, as he informed the justice. He afterwards returned the writ, but he had detached the original affidavit, and attached a copy of the affidavit in lieu thereof. He then again presented the original affidavit to the circuit court commissioner, on January 30, who erased the date at which it was first allowed, and inserted in the order of allowance the date "January 30." Plaintiff also presented to the commissioner a new bond bearing date that day, which he approved. On January 31 the plaintiff served the second writ of *certiorari* with a copy of the affidavit annexed, together with the bond last approved, upon the justice, and paid him two dollars for making his return. The justice refused to make return to the first writ served, for the reason that the bond was not served upon him within the 10 days specified by statute. How. Stat. § 7038, provides that:

"No *certiorari* shall be of any effect until all the preceding requisitions shall have been complied with."

The justice was right in refusing to make return to this writ. He also refused to make any return to the second writ served, upon the ground that the affidavit could not be made to serve as the basis for a second writ of *certiorari* in the same case. On application the circuit judge ordered the justice to show cause why he should not be compelled to make return to the second writ. In answer he showed the facts above stated, and the circuit judge then made a peremptory order for a return. It is

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this order we are asked to direct the circuit judge to set aside.

The statutory writ of *certiorari* is special, and the proceedings to obtain a review by this process must be strictly complied with. The plaintiff gave the notice of intention to remove the cause by *certiorari*, and made the affidavit within the five days limited by the statute. The plaintiff then had 30 days in which to present such affidavit to a circuit judge or circuit court commissioner for allowance of the writ. Within 10 days after the allowance of the writ the affidavit, upon which the order of allowance must be indorsed, must be filed in the office of the clerk of the circuit court, and such clerk is thereupon to issue the writ within 3 days after the filing of such affidavit. And then, within 10 days after it is issued, unless further time has been allowed by the officer at the time he allowed the writ, it must be served upon the justice, together with the bond prescribed by the statute, and approved by the same officer who allowed the writ, and the fees of two dollars must be paid to the justice for making his return. All of these steps have been taken within the time limited by the statute, if it is permissible to use the original affidavit the second time.

By express provision of the statute the first writ of *certiorari* ceased to be of any effect. The affidavit, having been duly filed with the clerk, did not cease to be effective as an affidavit by being attached to the first writ and served upon the justice. Its proper place was in the clerk's office, and the case is the same as it would have been had plaintiff presented it in or from that office again to the circuit judge or commissioner as the basis of a new order for the issuance of a new writ, the first being then of no effect. But the party has no right to take an affidavit from the files of the clerk's office to

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present it to the circuit court commissioner for a second order of allowance. Such files may be removed from the proper custody by an order of court, but without it the clerk has no right or authority to permit the files to pass from his custody. The statute does not contemplate any such action, and has not provided for it. On the contrary, the statute contemplates that the affidavit shall be presented to the judge or commissioner *before* it is filed in the clerk's office. The successive steps are expressly pointed out by the statute. The affidavit is to be presented to a judge or commissioner, and if the officer is satisfied an error has been committed—

"He shall allow the *certiorari* by indorsing his allowance thereon. The affidavit, *after* the allowance of the *certiorari* shall have been indorsed thereon," shall be filed, etc.

This language precludes the idea that the affidavit may be presented for another order of allowance, after the affidavit and allowance have been filed. The authorities cited in support of a second use of the affidavit do not apply under the special provisions of our statute. After an affidavit has been indorsed with an allowance of a writ, and filed in the clerk's office, and writ issued, it cannot be used as the basis for the allowance of a second writ of *certiorari*. For that purpose it is *functus officio*.

The circuit judge should vacate the order directing a return to be made by the justice.

The other Justices concurred.

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HUGH McLAREN v. THOMAS W. BYRNES AND JOHN STILES.

Lien of laborers for mining corporation—Enforcement—Foreign corporations.

1. How. Stat. § 8408, giving laborers for a mining corporation in the Upper Peninsula of Michigan a lien for the amount due them for such labor upon all of the real and personal property of the corporation there situate, applies to the *personal* labor performed by on overseer and custodian of the mines and property of the corporation while in charge of its works and property.[1]
2. All persons are bound to take notice that unpaid laborers for a mining corporation in the Upper Peninsula have a lien for their labor upon all of the real and personal property of the corporation in that portion of the State, which accrues and attaches as the labor is performed, and may be lost by laches, but not otherwise, unless by payment or satisfaction, or voluntary release or waiver.
3. How. Stat. §§ 8402–8404, provide for the enforcement of liens for labor performed for mining corporations in the Upper Peninsula by the commencement of a suit by summons, and in case of a failure to obtain personal service the plaintiff may proceed in all respects, as near as may be, as in suits commenced by attachment where personal service is not obtained upon the defendant.
4. How. Stat. § 8145, providing for the commencement of suits against foreign corporations where the cause of action accrues in this State, has no application to a suit for the enforcement of a lien for labor performed for a mining corporation in the Upper Peninsula, where no service is had upon any officer or agent of the corporation as provided by that section.

Appeal from Menominee. (Grant, J.) Submitted on briefs April 9, 1890. Decided April 25, 1890.

Bill to restrain the sale of the property of a mining

[1] See *Phillips v. Freyer*, 80 Mich. 254, construing the log-lien law of 1887 as applicable to the case of a manufacturing of lumber, etc.

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corporation in the Upper Peninsula on an execution in favor of a general creditor, until a judgment for unpaid labor is first satisfied, etc. Defendant Byrnes appeals from a decree granting the relief prayed for. Decree affirmed. The facts are stated in the opinion.

Cook & Pelham, for complainants, contended for the doctrine stated in the opinion.

B. J. Brown (*R. C. Ostrander*, of counsel), for appellant, contended:

1. That the judgment in favor of McLaren is void on its face—

a—Because How. Stat. §§ 8399–8407, are applicable only to cases where the property is in possession of the party claiming a lien.

b—Because How. Stat. § 8404, applies only to natural persons, and has no application to foreign corporations. This statute is in derogation of the common law, and is to be strictly construed; citing *Wagar v. Briscoe*, 88 Mich. 592.

c—Because How. Stat. § 8404, is to be read in connection with How. Stat. § 8143, and, giving effect to this latter section, service by publication was not warranted without a showing that no officer, member, clerk, or agent of the corporation could be found within this State.

d—Because, under How. Stat. § 8145, relative to commencement of suits against foreign corporations, service of the summons may be made upon any "officer or agent of the corporation." The return of the deputy-sheriff that the "defendant is not found, nor is any agent of said defendant found, in my county," does not satisfy the requirements of this statute, so as to give the court jurisdiction.

e—Because the McLaren judgment does not adjudge it to be a lien upon the property.

f—Because the judgment recites that it is "for work and labor performed by said complainant for defendant, at its request, as claimed in the notice of intention to claim said lien, as aforesaid." On referring to this notice, and the verified statement under it, we find the claim to be for nine months and twenty-two days' labor "as overseer and custodian of mine and property," at $80 per month,—$778.52. How much of this claim is for services as overseer of the mine, and how much for labor as custodian of the property, does not appear. The word "overseer" is to be taken in its natural, obvious sense, as implying rather superintendence and direction

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than personal exertion in manual labor; citing *Brockway v. Innes*, 39 Mich. 47.

CHAMPLIN, C. J. The bill of complaint sets up a judgment in McLaren's favor against the Prospect Hill Mining Company, a corporation organized under the laws of the state of Wisconsin, and doing a mining business in the county of Menominee and State of Michigan. This judgment was for the sum of $798.01 damages, and costs of suit. The judgment recited the fact that the same was rendered for the personal labor of complainant. He claims a lien upon the personal property of the mining company in the State of Michigan, under and by virtue of Act No. 201, Laws of 1867, being How. Stat. § 8408. Complainant claims, further, that his lien takes precedence of an attachment duly levied upon the personal property of the mining company, at the suit of the defendant Byrnes, six days prior to McLaren's filing a notice of claim of lien in the register's office of Menominee county. Defendant Stiles is sheriff of the county, and complainant prays that he may be restrained from selling the property of the mining company under an execution issued upon the judgment recovered by defendant Byrnes in said attachment suit, and from paying him any moneys derived from any such sale until complainant's judgment shall have been satisfied in full out of said property. This is the controversy between the parties.

The defendants deny that McLaren has or ever had a lien upon the property. They deny the validity of the judgment which he sets up in his bill, and assert that the same is invalid for want of jurisdiction apparent upon the face of the proceedings.

It is proper that we should first inquire whether McLaren ever had a lien upon the personal property of the mining company. On June 26, 1888, McLaren sub-

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scribed and swore to the statements contained in a notice, which he recorded with the register of deeds on June 29, 1888, at 7 o'clock and 15 minutes in the morning. In this notice he stated that he intended to claim a lien on all the real and personal property of the Prospect Hill Mining Company, a corporation organized and existing under the laws of the state of Wisconsin, and doing business in the county of Menominee, State of Michigan, lying and being in the Upper Peninsula of said State of Michigan, "for labor performed by me for said corporation;" that the performance of such labor was begun on September 1, 1887, and ended June 22, 1888, and the amount due him was $778.52. He then described the real estate and personal property upon which he claimed a lien; the personal property being the same that the attachment was levied upon.

The statute enacts that every person who shall furnish or perform any labor for any corporation organized for the purpose of mining, etc., in the Upper Peninsula of this State shall have a lien for the amount due therefor upon all the real and personal property of such corporation lying and being in such Upper Peninsula, which lien shall take precedence over all other debts, judgments, or decrees, liens, or mortgages against such corporation, except liens accruing to the State for taxes, fines, or penalties.

We think this statute is remedial in its character, and entitled to a liberal construction. The papers connected with the case show that the lien claimed was for personal labor performed by McLaren for the company while in charge of its works and property in said county as overseer and custodian of mine and property. The statute does not restrict the labor to any particular class of laborers or kind of labor performed. It only requires that it shall be labor furnished or performed for the corporation.

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We are of opinion that McLaren was entitled to a lien, under the statute, for the labor performed by him. The statute is silent as to when the lien accrues to plaintiff and attaches to the property. It must necessarily accrue and attach to the property as the labor is performed. It therefore had precedence in point of time to the levy of the attachment. The law does not provide for any notice. All persons are bound to take notice that unpaid laborers for a mining corporation in the Upper Peninsula have a lien for their labor upon all the real and personal property of the corporation in that portion of the State. The lien may be lost by laches, but not otherwise, unless by payment or satisfaction, or voluntary release or waiver.

The statute provides for the enforcement of the lien in general language. It says it shall be enforced in the same manner, as is provided in that chapter for the enforcement of liens against real and personal property. The chapter (How. Stat. §§ 8402–8404) provides for the enforcement of liens against personal property by commencement of suit by summons; and, if personally served upon the defendant, the suit proceeds to judgment as in personal actions so commenced. If personal service cannot be obtained, then the party is to proceed in all respects, as near as may be, as in suits commenced by attachment where personal service is not obtained upon the defendant. McLaren issued a summons, but did not obtain personal service; and thereupon he pursued the way pointed out in attachment proceedings to obtain substituted service by publishing notice. His proceedings appear to have been regular, and his judgment is valid.

Counsel are mistaken in supposing that How. Stat. § 8145, has any application where no service is had upon any officer or agent of the corporation. That provides what shall be done when service is made upon

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officer or agent, but makes no provision where such service cannot be obtained. In such case the method to be pursued is pointed out by section 8404, which method was adopted by McLaren in this case. Complainant's lien, having accrued before the lien of the attachment, is entitled to priority; and he is entitled to the relief prayed for.

The decree of the circuit court will be affirmed.

MORSE and LONG, JJ., concurred. GRANT and CAHILL, JJ., did not sit.

LORENZO D. DEWEY v. CHARLES KANER, COMMISSIONER OF HIGHWAYS.

Highways—Proceedings for widening.

1. Where a land-owner appeared in answer to a notice by the highway commissioner of a meeting to determine the necessity for altering and widening a highway, and objected to the proceedings on the ground that the application and notice and proof of service were not present, and was informed by the commissioner that they were at his house, and that if desired he would procure them, and his attorney answered that it would not be necessary to do so,—said papers being recorded in the proper record-book, which was present, and said land-owner having seen and inspected the original papers,—their absence will not invalidate the proceedings thereafter taken.
2. A highway commissioner is not obliged to enter into expensive litigation to determine whether a land-owner has encroached upon a public highway, as opened and used for many years, and who denies its legal existence, but may take him at his word and condemn his land far highway purposes, and pay him damages and compensation therefor.

Certiorari to the highway commissioner of the township

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of Raisin, Lenawee county, to review proceedings altering and widening a highway. Argued April 11, 1890. Proceedings affirmed April 25, 1890. The facts are stated in the opinion.

Westerman & Westerman, for petitioner, contended:

1. Admitting that the highway sought to be altered is one that has become such by public use, which is denied, it was the duty of the commissioner to have taken similar steps to those taken in the case of *Krueger v. LeBlanc*, 62 Mich. 70, 76. This he did not do, but seems to have relied wholly upon the opinion and judgment of the petitioners as to the starting point for the center line of the highway as proposed to be altered, without reference to its true boundary.
2. Dewey denied the existence of the highway in good faith, and, when this fact appears, commissioners of highways and town boards have no jurisdiction; citing *Roberts v. Highway Commissioners*, 25 Mich. 23; *Bennett v. Robinson*, 27 Id. 26; *Campau v. Button*, 33 Id. 527; *Gregory v. Stanton*, 40 Id. 272; *Shue v. Highway Commissioner*, 41 Id. 638; *Willson v. Gifford*, 42 Id. 456; *Gregory v. Knight*, 50 Id. 63; *Riggs v. Sterling*, 51 Id. 159.

Watts & Smith, for respondent.

CHAMPLIN, C. J. Application was made on October 9, 1888, to the commissioner of highways of the township of Raisin, in the county of Lenawee, to alter and widen a certain highway in said township, so that it should be four rods wide. The center line of such highway, when widened, was particularly set forth in the petition. The commissioner gave notice to the parties interested, and who would be affected by the alteration, of the application, and of the time and place when and where he would meet to proceed to view the premises described in the application and notice, and ascertain and determine the necessity of so altering said highway, and appraise the damage. The time appointed was October 26, 1888, at 1 o'clock P. M. At the time and place appointed the com-

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missioner met. Proof of service of notice personally upon L. D. Dewey, the petitioner, showed that such notice had been served on October 12, 1888. The commissioner proceeded to view the premises, and determined that it was necessary to alter said highway pursuant to the application, and to take the land described therein for the use of the public for a public highway; and he ascertained and appraised the damage of petitioner by reason of taking a strip of his land therefor at $130, said petitioner being the only person who claimed damage therefor. The proceedings and return of the commissioner were duly returned to the office of the township clerk, and recorded October 27, 1888. The return shows that the damages awarded to petitioner were tendered to him on May 17, 1889. It further appears by the return that at the time and place appointed for meeting on October 26, 1888, petitioner appeared before him with his attorney, and filed written objections against the commissioner proceeding, as follows:

"We object to the commissioner proceeding in this matter, for the following reasons:

"1. Because no proper notice was served.

"2. Because there is no description of the highway to be altered as required by law.

"3. Because the highway spoken of in the notice served does not in fact exist.

"4. Because there is no highway crossing the description mentioned in said notice.

"5. Because there is no description of any highway to be altered, contained in said notice.

"6. Because no notice was given as required by law.

"7. Because the original petition is not present to be viewed by any one.

"8. Because there is no proof of service, or any notice. L. D. DEWEY."

The action of the commissioner was not challenged until July 8, 1889, when this writ of *certiorari* was sued

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out. The errors assigned in the affidavit for *certiorari* are as follows:

"1. Because it does not appear by said record or proceedings that there is a legal highway to be altered.

"2. Because it does not appear in any of the proceedings taken to alter said alleged highway that at the time of the hearing upon the application therefor the commissioner had present at such hearing said application, notice, or affidavit, as the law requires.

"3. Because said commissioner did not have such application, affidavit, or notice present at such hearing.

"4. Because no such notice as the law requires in such cases was ever served upon this deponent.

"5. Because the application hereto attached does not give the highway commissioner jurisdiction to alter a highway, or to act in the premises.

"6. Because the highway spoken of in the proceedings does not in fact exist."

The return shows that there was a public highway for the past 30 years and upwards along the line described in the application, which was open and traveled by the public, and worked as a public highway; that since said Dewey has purchased the land adjoining such highway he has been constantly encroaching thereon, setting his fences further into the highway towards the center thereof, claiming there was no highway there. The return further shows that notice of the application was duly served upon petitioner, and that such notice is in form and substance sufficient.

As to the second and third assignments of error, the return shows that the petitioner appeared by his attorney, and objected to the proceedings on the ground that the application and notice and proof of service were not present; and that the commissioner then informed them that he had left said papers at home, but would go for them if desired, but said attorney remarked that it would not be necessary. The return further shows that the original papers had been seen and inspected by petitioner prior to

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said day, and that the record thereof in the record-book kept by the town clerk was present at said time. Under these circumstances, the second and third assignments of error must be overruled.

The fourth assignment of error is overruled. We have already observed that the notice was sufficient.

The first, fifth, and sixth assignments are overruled. The return shows with sufficient certainty that there was a legal highway existing to alter; that it was not four rods wide; that petitioner claimed to own the land which would be affected by widening the highway to its legal width. The township authorities were not obliged to enter into an expensive litigation to determine whether Dewey had encroached upon the highway, when the question was in doubt, and the fact disputed. Dewey cannot complain because they took him at his word, and proceeded to condemn his land for highway purposes, and pay him damages and compensation therefor. The return makes a complete answer to the petition, and shows that the errors alleged do not exist.

The proceedings of the highway commissioner must be affirmed, with costs against the plaintiff in *certiorari*.

The other Justices concurred.

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In the Matter of the Estate of Charles Lautenshlager, Deceased. Samuel L. Lautenshlager and Elizabeth Ann Van Houten, Proponents, v. John J. Lautenshlager, Contestant and Appellant.

Will—Deed to become operative at death of grantor—Evidence.

1. The *form* of an instrument is of little consequence in determining whether it *is* or is *not* a will. If it is executed with the formalities required by the statute, and is to operate only *after the death* of the maker, it is a will.

   So *held*, where a father, being of sound and disposing mind and memory, executed two instruments, in form warranty deeds, one to a son and one to a daughter, inserting in each, directly after the description of the land, and before the words "together with all and singular," etc., these words: "Also one-half of all the personal property and money left at my death shall go to the above" grantee, naming him. The papers were executed in the presence of two competent witnesses, who signed the same in the father's presence, and at his request. He took the papers, after their execution, to his residence, and placed them in the bureau in his room, where they remained until after his death. Upon the day of or shortly after the execution of the papers, he informed the son and daughter of such fact, and stated to them that he should retain the papers and the control of his property while he lived, and that they could not have them until after his death. He had previously deeded to each of his other three sons, 80 acres of land, for which they claimed to have compensated him, and had expressed his intention to do what was right and fair by the other son and daughter; and it is held that all of the essential qualities of a will are to be found in the instruments, and in the circumstances under which they were executed, and with which they are surrounded.

2. A son and daughter offered for probate two instruments, in form warranty deeds, purporting to convey to each a portion of the father's real estate. In order to establish the testamentary character of the instruments, they were permitted to testify that the deceased retained the papers in his possession, and on the day of their execution informed them that he should retain

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such possession, as also the control of his property, while he lived. This testimony was objected to by the contestant, a brother of the proponents, as incompetent under How. Stat. § 7545, the facts stated being equally within the knowledge of the deceased; and it is held that said statute has no application to such a case; citing *Brown v. Bell*, 58 Mich. 58; *Schofield v. Walker*, Id. 96.

Error to Monroe. (Kinne, J.) Argued April 15, 1890. Decided April 25, 1890.

Appeal from the probate of two instruments, in form warranty deeds, but claimed by the proponents to be a will. Affirmed. The facts are stated in the opinion.

Palmer & Palmer, for appellant, contended:

1. Possession of the deeds by the grantees is *prima facie* evidence of their delivery; citing *Dawson v. Hall*, 2 Mich. 390; *Patrick v. Howard*, 47 Id. 40; *Foster v. Hill*, 55 Id. 450; and the delivery of a deed is presumed to have taken place at the time of its acknowledgment, if an earlier or later delivery is not shown; citing *Blanchard v. Tyler*, 12 Mich. 339; *Johnson v. Moore*, 28 Id. 3; *Eaton v. Trowbridge*, 38 Id. 458; and these deeds, having been recorded when produced by the proponents, presumably had been delivered; citing *Patrick v. Howard*, 47 Mich. 45.
2. The recital in the deeds that they were made for the stated consideration of $2,000 is *prima facie* evidence of the payment of such consideration; citing *Mowrey v. Vandling*, 9 Mich. 39.
3. The personal-property clauses do not form a part of the instruments, and do not affect or change their terms or meaning; and, unless suspicious in appearance, alterations or interlineations are presumed to have been made before the execution of the instrument; citing *Munroe v. Eastman*, 31 Mich. 283; *Sirrine v. Briggs*, Id. 445; *Brand v. Johnrowe*, 60 Id. 210; and the burden of proof was upon the proponents to explain the erasure; citing *Comstock v. Smith*, 26 Mich. 315; *Sheldon v. Hawes*, 15 Id. 519.
4. What decedent told the proponents must have been equally within his and their knowledge, so incompetent; the estate of the decedent had been admitted to probate, which action is not appealed from, but in this collateral proceeding proponents seek to appropriate decedent's entire estate; citing How. Stat. §

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7545; *Brown v. Bell*, 58 Mich. 60; *Pendill v. Neuberger*, 64 Id. 223, 67 Id. 562; *Taylor v. Bunker*, 68 Id. 258.

5. If an instrument or writing passes a present interest in real estate, although the right of possession and enjoyment may not accrue until some future time, it is a deed or contract; but, if it does not pass an interest or right until the death of the maker, it is a will or testamentary paper; citing *Reed v. Hazelton*, 37 Kan. 325; *Sperber v. Balster*, 66 Ga. 317; *Turner v. Scott*, 51 Penn. St. 126; *Burlington University v. Barrett*, 23 Iowa, 60.

6. The instruments being warranty deeds, it is not competent to show by parol evidence the contrary, and that they are the last will of the decedent; citing 1 Jar. Wills, 409; and if the words of a will are clear, and have a definite meaning, no extrinsic evidence can be admitted to show a different meaning; citing 1 Greenlf. Ev. § 290; *Canfield v. Bostwick*, 21 Conn. 550; *Porter v. Porter*, 50 Mich. 456, 460; *Brown v. Saltonstall*, 3 Metc. 426.

7. In support of the proposition that the intent of the testator must be ascertained from the consideration of the language used, which cannot be explained or varied by parol evidence, counsel cited *Kinney, v. Kinney*, 34 Mich. 254, 255; *Waldron v. Waldron*, 45 Id. 353; 1 Redf. Wills, 433; *Griscom v. Evens*, 40 N. J. Law, 402; *Dunham v. Averill*, 45 Conn. 67.

I. R. Grosvenor and *George M. Landon*, for appellees, contended:

1. The form of the instrument is of little or no consequence in determining whether it is a will or not. If it is to operate after the death of the maker, it is enough; citing *Morrell v. Dickey*, 1 Johns. Ch. 153; *Turner v. Scott*, 51 Penn. St. 126; *Ritter's Appeal*, 59 Id. 9; *Frew v. Clarke*, 80 Id. 171; *Crain v. Crain*, 17 Tex. 80; *Crain v. Crain*, 21 Id. 790; *Millican v. Millican*, 24 Id. 426; *Hart v. Rust*, 46 Id. 556; *Gage v. Gage*, 12 N. H. 371.

2. The facts of execution and delivery, the declarations of the maker at the time, and all the surrounding circumstances of the transaction, together with the instrument itself, may be considered in such connection, and the paper will be pronounced to be what, upon the whole, the true scope and bearing of its contents entitle it to be considered; citing *Gage v. Gage*, 12 N. H. 371; *Thompson v. Johnson*, 19 Ala. 59; *Evans v. Smith*, 28 Ga. 98.

CAHILL, J. This case was commenced in the probate

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court of Monroe county on the petition of Samuel L. Lautenshlager and Elizabeth Ann Van Houten, asking for the probating, as the will of Charles Lautenshlager, deceased, of two instruments in writing in the form of deeds. In that court these instruments were admitted to probate. The contestant, John L. Lautenshlager, one of the sons and heirs at law of the testator, appealed to the circuit court, where, on a hearing before the circuit judge without a jury, the order of the probate court was affirmed. At the request of appellant the court filed a written finding, a bill of exceptions was settled, and the case is brought to this Court on writ of error.

Certain evidence offered by the proponents was received against objection, and upon the admission of this evidence various errors are assigned. It is also assigned as error that the circuit judge found as a conclusion of law that the instruments admitted to probate as a will were testamentary in character, and ought to be admitted to probate as the last will of Charles Lautenshlager, deceased, and the principal question in the case is as to whether the circuit judge was right in that conclusion of law.

The instruments were, in form, warranty deeds. They were executed December 22, 1885, before two witnesses, and acknowledged before John L. Near, a notary public, in the usual form. By one of them, the grantor, for the consideration of $2,000 named,–

"Does by these presents grant, bargain, sell, remise, alien, and confirm unto the party of the second part [Elizabeth Ann Van Houten], and to her heirs and assigns forever [forty acres of land in Ash, Monroe county], together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining; to have and to hold the said premises, as above described, with the appurtenances, unto the said party of the second part, to her heirs and assigns forever."

Then follows the usual covenants of seisin, against in-

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cumbrances, and of warranty. A similar deed was made on the same day, and for the same consideration, to Samuel L. Lautenshlager, conveying the south 40 acres of the 80-acre tract from which the description in the other deed was taken. The grantees named in these deeds were the son and daughter of the grantor. In the deed to Mrs. Van Houten, in the blank space after the description of the land, and before the words "together with all and singular," etc., was written, apparently in the same handwriting as the rest of the deed, these words:

"Also one-half of all the personal property and money left at my death shall go to the above Elizabeth Ann."

A similar provision was written in the same manner in the deed to Samuel L. Lautenshlager, giving to him one-half of all the personal property and money left at the death of the grantor. Across these clauses in the deeds, commencing at the right-hand upper corner, immediately below the description of land, and running diagonally across the blank space to the left-hand lower corner, so as to end at the word "together," was drawn a line in ink. It was claimed by the contestant that the diagonal line indicated a purpose on the part of the grantor to erase and strike out of the deeds the clauses relating to personal property, whereas it was claimed by the proponents that these clauses were intended to be and should be read as a part of the instruments. As to which of these positions was correct must depend upon what the evidence in the court below showed as to when, and the circumstances under which, the clauses in question were written in the instruments,—whether before or after the diagonal line was drawn.

It was competent, of course, to prove by the witnesses to the execution of the instruments, or by any other

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competent testimony, these circumstances. We do not know just what evidence was offered to this point, as the bill does not purport to set out all the evidence. The finding of the circuit judge upon this point is not as explicit as it might have been made, but we think his fifth finding of fact was intended to cover this point. It is as follows:

"I find, also, as a matter of fact, that the decedent, when he made these instruments, intended that they should operate only at or after his death; that he intended that no part of his estate and interest, either in his personal property or in his real estate, should pass by virtue of these papers until his death, and that said property should then pass to the parties named; that he retained these papers in his custody, and under his control, without attempting a delivery, and retained them with full power of revocation until his death."

Accepting this as a finding of the circuit judge that these clauses relating to personal property were and should be read as a part of the instruments, it remains to be seen whether the testimony which may have influenced the finding was legal and competent.

On the trial in the circuit court the proponents, Samuel L. Lautenshlager and Elizabeth Ann Van Houten, were called as witnesses for the purpose of establishing the testamentary character of said instruments, and they were allowed, under objection, to testify that after said instruments were executed deceased took them to his room, and placed them in his bureau, where they remained till after his death; that on the day the papers were executed he communicated the fact that they were executed to them, and stated to them that he should retain them and the control of his property while he lived, and that they could not have them till after his death. This testimony was objected to upon the ground that what decedent told proponents must have been equally within his knowledge

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and their knowledge, and so incompetent under our statute. How. Stat. § 7545. It must be considered as settled in this State by *Brown v. Bell*, 58 Mich. 58 (24 N. W. Rep. 824), and *Schofield v. Walker*, Id. 96 (24 N. W. Rep. 624), that the statute relied on does not apply to a case like the present. If the question were open, it might certainly admit of argument; but we are agreed that it must be considered as closed.

It is objected by contestant that the witness Near, the conveyancer who drafted the instruments, was allowed to testify that deceased, when he made the instruments, intended that they should operate only after his death; that he intended that no part of his estate, either personal or real, should pass by these papers. The bill of exceptions does not set out the testimony by questions and answers, as it was given on the trial, but gives a brief summary of it. It does not appear that the witness was asked to testify to the decedent's intention, and that such testimony was objected to and admitted. We cannot assume on this record that counsel would attempt to introduce, or that the court would permit, such testimony, nor that, if it was given, the court would act upon it.

Construing these instruments, then, as containing these clauses relating to personal property, the question arises as to whether the instruments, so construed, will justify the judgment of the court below, declaring them to be the last will and testament of Charles Lautenshlager. In determining this question it is essential that we should avail ourselves of the facts found by the circuit judge bearing upon this question. They are as follows:

"1. That the deceased, Charles Lautenshlager, was a resident of the township of Ash, in the county of Monroe, and State of Michigan, at the time of his death, which occurred upon August 12, A. D. 1888; and at the time of his death he left five children,—the appellant,

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John Lautenshlager, and Henry Y. Lautenshlager, Frank Lautenshlager, and Samuel Lautenshlager, and Elizabeth Van Houten, daughter.

"2. I further find that on December 22, 1885, he executed the two papers introduced in evidence, and marked Exhibits 'A' and 'B;' that at the time of the execution of these papers by decedent he was of sound and disposing mind and memory; that he subscribed and executed these papers in the presence of two competent witnesses, who signed the same in his presence, and at his request.

"3. I further find that after the execution of these papers he took them to his room at his residence, and placed them in the bureau of his room, where they remained until after his death. Upon the day or shortly after the execution of said papers he communicated their contents and the fact of their execution to the two parties named in the papers, Samuel Lautenshlager and Elizabeth Van Houten, and stated to them substantially that he should retain them, and the control of his property, while he lived, and that they could not have them till after his death.

"4. I find, also, that he had previously deeded to each of his other three sons 80 acres of land, for which, however, they claim to have compensated him, and that he had expressed his intention to do what was right and fair by the two parties named in these documents."

The fifth finding of fact we have already quoted. Accepting these findings of the circuit judge as conclusive upon us, it is clear that all of the essential qualities of a will are to be found in these instruments, in the circumstances under which they were executed, and with which they are surrounded. The form of any instrument is of little consequence in determining whether it is a will or not. If it be executed with the formalities required by the statute, and if it is to operate only after the death of the maker, it is a will. *Bigley v. Souvey*, 45 Mich. 370; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Bayley v. Bailey*, 5 Cush. 245; *Gage v. Gage*, 12 N. H. 371; *Frew v. Clarke*, 80 Penn. St. 170; Schouler, Wills, § 265 *et seq.*; 1 Redl. Wills, 170 *et seq.* That this was the intention of Charles

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Lautenshlager in the execution of these instruments was found by the circuit judge to be a fact. The conclusion of law legitimately follows.

The judgment must be affirmed, with costs.

The other Justices concurred.

E. B. MILLAR & COMPANY (A CORPORATION) v. CHARLES E. OLNEY AND JOHN G. SHIELDS, IMPLEADED WITH ABBIE ANTRIM AND JOSEPH HARTMAN.[1]

[See 69 Mich. 560.]

Chattel mortgages—Trover—Payment—Costs.

Prior mortgagees of a *portion* of the property covered by another chattel mortgage, duly filed, seized the *entire* property, which they refused to surrender to the other mortgagee, who brought trover for its value. Before the trial the mortgagor paid the plaintiff's claim, and the defendants thereupon interposed a plea setting up such payment, but did not pay or tender the costs of suit; and it is held that, to render their plea effective, such payment or tender should have been made, and a judgment for six cents damages and costs of suit in favor of the plaintiff is affirmed.

Case made from Kent. (Burch, J.) Argued April 16, 1890. Decided April 25, 1890.

Trover. Defendants Olney and Shields assign error. Affirmed. The facts are stated in the opinion, and in the former report of the case in 69 Mich. 560.

[1] Joseph Hartman and Abbie Antrim are the father and mother, respectively, of the members of the firm of Hartman & Antrim, and were also mortgagees of the property in dispute.

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Earle & Hyde, for appellants, contended:

1. The plea of payment was a plea in bar, as though a plea of full payment had been interposed in the first instance, in which case, the truth of the plea being admitted, verdict and judgment must have passed for the defendants; citing Steph. Pl. 97, 98; *Grosslight v. Crisup*, 58 Id. 531; *Lithographing Co. v. Randall*, 78 Id. 195.
2. If the plaintiff, having but a limited interest, brings his action against one having the remaining interest, or against one claiming under such residuary owner, he can only recover according to his interest; citing *Fowler v. Gilman*, 13 Metc. 267; *Tenney v. Bank*, 20 Wis. 161; *Briggs v. Railroad Co*, 6 Allen, 246; *Case v. Hart*, 11 Ohio, 364; *Peebles v. Railroad Co.*, 112 Mass. 498.
3. The holder of a lien seeking to enforce it, or who sues the owner or one claiming under him for conversion of the property, can only recover the value of his lien; citing *Bailey v. Godfrey*, 54 Ill. 507; *Sheldon v. Express Co.*, 48 Ga. 625; *Spoor v. Holland*, 8 Wend. 445; *Ward v. Henry*, 15 Wis. 239.
4. The interest of the plaintiff in the property having been fully paid before trial by the owners and mortgagors, it had no lien upon or interest in the goods it had declared upon, and could recover nothing, and Olney and Shields should have had judgment. But, even if plaintiff was entitled to judgment, it recovered less than $100, which was not reduced by set-off, and was not enough to carry costs; citing How. Stat. § 8964 (subd. 5); *Ladd v. Duncan*, 23 Mich. 285; *Bolio v. French*, 21 Id. 164; *Jeffery v. Hursh*, 58 Id. 247, 258; *Tolford v. Church*, 66 Id. 431.
5. If, after suit brought plaintiff receives from defendant the full amount claimed, with interest, without insisting on payment of costs, his right to costs is extinguished; citing *Bendit v. Annesley*, 42 Barb. 192, 27 How. Pr. 184.

Turner, Carroll & Preston, for plaintiff, contended for the doctrine stated in the opinion.

GRANT, J. The plaintiff had a chattel mortgage executed by Hartman & Antrim upon a stock of goods and other personal property. Defendants Olney and Shields also had a chattel mortgage upon the stock, but not upon the other personal property. Olney and Shields took possession, under their mortgage, of *all* the property.

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Plaintiff made demand of possession, which was refused, and then brought this action for the conversion.

Plaintiff was a corporation doing business in Chicago. While this suit was pending, Hartman & Antrim paid to plaintiff the amount of its debt, which gave them a receipt stating that the account had been fully settled, and that it had no claim against the firm of Hartman & Antrim. Olney and Shields then interposed their plea *puis darrien continuance*, setting up this payment. The case was tried before the court without a jury. It was admitted that Olney and Shields seized, and refused to return to plaintiff on demand, goods of the value of $200, on which the plaintiff had a chattel mortgage, duly filed, and in which the defendants had no right or interest whatever. The court thereupon rendered judgment against the defendants for six cents damages, and costs of suit to be taxed.

Courts have held that, when a defendant has paid the plaintiff the amount of the debt due from him, and for which the suit was brought, and plaintiff has received it without insisting upon the payment of costs, his right to costs is extinguished. But that is not the case here. Olney and Shields had no control over the debt due to plaintiff from Hartman & Antrim. Olney and Shields were alone defending. They had no interest in nor right to the possession of the property, and were mere naked trespassers. Plaintiff had no claim against Hartman & Antrim for the costs of the suit, for they were in no manner responsible for the wrongful act of Olney and Shields in seizing the property. A tender by Hartman & Antrim to plaintiff of the full amount of principal and interest due would have stopped the running of interest, and discharged the lien, regardless of this suit. Plaintiff, in order to protect its rights, was compelled, not by Hartman & Antrim, but by Olney and Shields, to bring

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this suit. The defendants were liable to plaintiff for the costs; and, in order to render their plea effective, should at some time have tendered or offered to pay the costs up to the time of filing the plea.

Judgment affirmed, with costs.

The other Justices concurred.

CYRUS J. HOOD v. FREDERICK H. OLIN, SURVIVOR OF HIMSELF AND EMMOR WARE, COMPOSING THE FIRM OF WARE & OLIN.

[See 68 Mich. 165.]

Practice in circuit court—New trial—Theory of party—Contract—Sale—Retention of title—Payment.

1. A party cannot change front, after prosecuting his suit through the courts upon one theory and state of facts, and present a different theory; citing *Hamilton v. Frothingham*, 71 Mich. 617.
2. Plaintiff, as mortgagee of one Nead, replevied a span of horses which he had taken possession of under his mortgage, and which the defendant (for Ware & Olin) rescued by force, claiming ownership of the property; Ware having furnished the team to Nead under a logging contract, but retaining the title until the horses were paid for. The team was furnished to be used on a logging job, and not elsewhere, at the *completion of which* it rested with Nead to say whether he would keep and pay for the team or not, and if so he had the right to apply in payment any balance *then* due him on the contract. Nead did not perform the contract, and, as Ware & Olin claimed, abandoned it, and they took possession, and completed the job, but Nead claimed that such action on their part was wrongful. In reversing the action of the trial court in directing a verdict in favor of the defendant Olin, it is held that the issue *thus* raised was the material question in the case, and, if found in favor of Nead, the state of his account with Ware & Olin

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became important to be shown, and the burden of proof was upon plaintiff to show payment, and any testimony having a tendency to prove that fact was admissible.

Error to Mecosta. (Palmer, J.) Argued April 16, 1890. Decided April 25, 1890.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion, and in 68 Mich. 165.

Dumon & Cogger, for appellant.

M. Brown and *Earle & Hyde,* for defendant.

CHAMPLIN, C. J., After the jury were empaneled in the court below, the plaintiff's attorney opened his case as follows:

"This cause, gentlemen of the jury, is replevin, brought by Mr. Hood against the firm of Ware & Olin to recover possession of one chestnut colored mare, about ten years old; one black gelding, about ten years old,—said team known as the team bought by E. M. Nead of Seaman & Rice; also one set of double harness; one yoke of red oxen, known as the team bought by E. M. Nead of Ware & Olin; also one ox yoke and chain.

"The facts and circumstances in this case we expect to show, briefly stated, are these: Mr. Nead, some time ago,—and I don't remember exactly when, but I think it was on February 9, 1886.—was in possession of this property, and claimed to be the owner of it. On that day he executed a chattel mortgage to Mr. Hood covering this property. In that chattel mortgage was a clause which authorized Mr. Hood, at any time he deemed himself insecure, to take possession of the property, and keep it, and make some final disposition of it, as provided for in the mortgage. A few days after getting this mortgage, Mr. Hood deemed himself insecure, and sent Mr. Overton to Nead's camp, where the property then was,—the camp, I think, was situated at or near Pickerel lake, in this county,—to take possession of this team. He did take possession of it, and delivered it to one Clifford to hold for Mr. Hood; or both teams,—all of the property covered by the chattel mortgage. And they were starting north toward Evart,

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or some other place,—Harrison,—to work them in a camp, with Mr. Nead's consent. Mr. Olin claimed that he owned the team, I believe, or that Ware & Olin owned the team; and he took those teams from Clifford, and stated at the time to Mr. Clifford that he had a bill of sale of them; and we expect to show that he had a bill of sale of them from Nead. Mr. Hood brought replevin against the firm of Ware & Olin to recover possession of the property. Mr. Ware died before the pleadings in this case were perfected, and they were perfected against Mr. Olin, the surviving partner of the firm of Ware & Olin. The suit stands in that shape now.

"One of these teams was bought by Nead from Seaman & Rice. There was an arrangement between Mr. Ware and Mr. Olin on one side, made by Mr. Ware, and Mr. Nead, by which or through which Mr. Ware was to furnish him (Nead) a team, or means to pay for a team; and it was to be applied, as we claim, on a lumber contract—a logging contract—which Nead was putting in. After Nead bought these horses, Mr. Ware gave his note to Seaman & Rice; and I presume, in due time, paid the note,—paid for the team. Mr. Nead went on and put in logs,—shingle logs, and lumber logs, etc.,—and, we claim, paid for these teams.

"Inasmuch as the case has once been tried, I don't know but it will give you a better idea of it for us to state that they on the other side claim that Nead has not paid for the teams. It appears to me that the controversy in this case may be whether these teams have been paid for, because they claim, on the other side, that the title to the teams was to remain in Ware & Olin until they were paid for. If I am not mistaken in this issue, in the claims made by the other side, and knowing what we claim, the main question in this case, probably, will be whether those teams have been paid for, and, consequently, whether Mr. Nead had the right to give Mr. Hood a chattel mortgage. It seems to me that will be about the issue in this case."

To support the issue upon his side, he introduced in evidence the chattel mortgage, and also proved the indebtedness for which it was given as security, the fact that he deemed himself insecure, and the taking possession of the property; that defendant, Olin, forcibly took

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it from his possession under a claim of ownership, claiming that Nead had given him a bill of sale on December 24 previously. The defendant introduced testimony tending to show that Mr. Ware, of the firm of Ware & Olin, purchased the horse team, and furnished both teams to Nead under a contract bearing date May 25, 1885, between Nead and Ware; that Ware & Olin were then in partnership in the lumbering business; and that the contract was made for the benefit of Ware & Olin, and that they were jointly interested therein. The items of the contract are set out in the opinion of this Court in 68 Mich. 165.

It will be seen that the issue made was whether the title of the property, at the time the chattel mortgage was executed by Nead to Hood, was in Nead,—the defendant claiming that the title of the property remained in Ware until the teams were paid for by Nead, and that they had not been paid for; and the plaintiff claiming that they had been paid for at that time by performance of the contract. We held when the case was here before that there was no statement in the contract in what manner Ware was to be paid for the teams by Nead. We also held that, by the undisputed testimony, it should be held that Ware furnished both teams, and that the title was in Ware when they were taken to the camp; that Ware was not obliged to take his pay for the teams in work unless he chose to, any more than Nead was obliged to pay for the teams in his labor before he could obtain them. In other words, at any time before the completion of the job, according to the contract, Nead could pay Ware for the teams, and thereupon the title would pass to him.

It is also evident from the contract that the teams were to be furnished to be used by Nead upon the job, and not elsewhere; and it appears, also, as a just and

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legal inference, that at the completion of the job it rested with Nead to say whether he would pay for the teams or not; and, further, that if he did choose to keep the teams, and pay for them, he could apply in payment any balance which should then be due to him under the contract. Both parties treated this as the true construction and meaning of the contract. Ware & Olin at once charged the teams as advances made to Nead under the contract, with other advances made; and we held that these, including the teams, were to be accounted for when the contract was performed.

The contract was not fully performed by Nead. He did no work after February 10, 1886; and, if he was in fault for not completing the job in accordance with the contract, the title to the teams never passed to him, and he had no right to mortgage them to secure his debt to Hood. But, if Ware & Olin terminated the contract before the time limited without sufficient cause,—that is without some act or conduct on the part of Nead which would authorize them to terminate the contract,—then Nead had the right to elect to keep the teams, regard them as advances, and to apply in payment therefor, if sufficient for that purpose, the balance due him under and according to the terms of the contract.

The material question, then, was whether Ware & Olin prevented, without justification in law, Nead from performing the contract, or whether Nead forfeited his rights under it by his conduct, or abandoned the performance of it. If the defendants' testimony satisfied the jury that, at the time Ware & Olin took possession, Nead had formed the intention of abandoning the job, and was in the act of carrying out that intent, and had in pursuance thereof, and before they had taken possession, executed this mortgage upon the property as his own, and had begun to haul away his goods with intent to

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abandon the work, they were justified in taking possession and terminating the contract. But if, on the contrary, Nead had not formed the intention of abandoning the contract, but was going on in the performance of it, they had no right to prevent him from doing so; and he would have the right, if he was so prevented, to treat the contract as terminated. Under the facts, as the jury should find them upon this question, depended the right of Nead to apply sufficient of the balance due to him for work under the contract in payment for the teams; and, if the question was determined in Nead's favor, then the state of the account between Nead and Ware & Olin became important to be shown, and the burden of proof was upon the plaintiff to show payment, and any testimony having a tendency to prove that fact was admissible.

The plaintiff was not at liberty to present a different issue to be tried than that assumed in his opening to the jury. The court was right in excluding testimony offered to prove that Ware or Ware & Olin did not own and furnish the horse team, or that Nead owned it. We have held heretofore that a party cannot change front, after prosecuting his suit through the courts upon one theory and state of facts, and present a different theory. *Hamilton v. Frothingham,* 71 Mich. 617.

It was competent for plaintiff to show that defendant had asserted claims inconsistent with the theory of the defense set up by him; but he could not show the contents of the bill of sale without first giving notice to defendant to produce it, and his neglect or refusal to do so.

The court took the case from the jury on the ground that it was essentially the same state of facts which were before us in 68 Mich. 165. What Chief Justice SHERWOOD said in that case (p. 175) was:

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"I do not think that the state of the account between the parties to the contract, during the continuance of the work provided for therein, had any effect whatever upon the title to the teams, and the court erred in so holding."

This is our holding now; but the question should have been submitted to the jury whether the work under the contract had been terminated, and, if so, by whose act or default, as above pointed out.

The judgment must be reversed, and a new trial ordered.

MORSE, GRANT, and CAHILL, JJ., concurred. LONG, J., did not sit.

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THEODORE DUMANOISE v. THOMAS TOWNSEND AND RUFUS WORDEN.

Partnership—Co-principals—Liability to third parties.

In a proceeding to charge one person with a liability in conjunction with another, the issue is not necessarily upon the existence of a partnership between them, but upon the performance of an act to which the law attaches a joint obligation.

So *held*, where A. and B. agreed to purchase logs, have them hauled to a mill, and manufactured into lumber. B. was to do the buying and attend to the business, and A. was to advance the money. They examined the timber jointly, and in some instances both negotiated for its purchase. B. referred purchasers to A., who paid for most of the logs directly to the vendors. He also paid some parties for hauling, and he paid for the sawing of the logs. A. was to have a claim on the lumber as security for the money advanced, but took no chattel mortgage, and was to reimburse himself out of the proceeds of the lumber. B. hired plaintiff to haul logs, and also to load the lumber on a car for shipment; and it is held that A. and B. were co-principals in both transactions, and as such liable to pay plaintiff the balance his due.

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Error to Genesee. (Newton, J.) Argued April 15 and 16, 1890. Decided April 25, 1890.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

R. C. Johnson and *Durand & Carton,* for appellant, contended for the doctrine stated in the opinion.

George E. Taylor and *Geer & Williams,* for defendants, contended.

1. The same rule should apply in establishing a partnership as would be required to establish an agency, in which case it is incumbent upon a person dealing with another assuming to act for an individual, firm, or corporation to ascertain what his authority is, and his own statement of his authority is not sufficient to establish such agency; citing *Kornemann v. Monaghan,* 24 Mich. 37; *Sewing Machine Co. v. Polhemus,* 34 Id. 249; *Rice v. Peninsular Club,* 52 Id. 90; *Heishfield v. Waldron,* 54 Id. 651; *Bond v. Railroad Co.,* 62 Id. 643.

5. In support of the claim that the promise, if made, was within the statute of frauds, counsel cited *Waldo v. Simonson,* 18 Mich. 345; *Stewart v. Jerome,* 71 Id. 201; *Bresler v. Pendell,* 12 Id. 224; *Corkins v. Collins,* 16 Id. 478; *Welch v. Marvin,* 36 Id. 59; *Pratt v. Bates,* 40 Id. 37; *Preston v. Young,* 46 Id. 103; *In re Tozer Estate,* Id. 299; *Baker v. Ingersoll,* 39 Id. 158; *Gower v. Stuart,* 40 Id. 747.

CHAMPLIN, C. J. This action was brought to recover a balance claimed by plaintiff to be due to him from defendants for hauling black-walnut logs, and loading black-walnut lumber upon a car. The plaintiff claimed a joint liability on the part of defendants. Townsend defended, denying all liability.

The plaintiff introduced testimony which tended to show that defendants were partners in the purchase of certain black-walnut logs of different farmers in the vicinity of Davison, a station on the Chicago & Grand Trunk Railway, where a saw-mill was located, and in the manufacture of such logs into lumber, and the sale there-

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of; and he claims that their relations were such, in carrying forward the business, that they were partners, and jointly liable to him for the labor performed.

Plaintiff showed that defendants went in company with each other to different farmers, and bargained for black-walnut trees and logs, and for cutting and hauling them to the mill, and that Worden went alone to a farmer by the name of Long, and represented that he and Townsend where in partnership in purchasing black-walnut, and that Townsend would pay him therefor, and that Long went to Townsend, and told what representations Worden had made, and he said it was all right, and afterwards paid him for the logs, and for hauling them to the mill; that Worden was irresponsible, and known to be so by those from whom the timber was purchased; that Worden engaged plaintiff to haul black-walnut logs to the mill which had been purchased of farmers. He told him that Townsend would see that he got his pay for it. Before he had finished hauling, there being but four or five loads more to haul, he requested two of his teamsters who were hauling logs for him to see Townsend personally, and ascertain if he was responsible for his pay. They did see Townsend, and asked him if he was to be responsible for the pay for hauling the logs; and he said he was, for every dollar. They reported this conversation to plaintiff, and he went on, and completed the hauling of the logs.

Plaintiff also showed that Worden engaged him to load the lumber sawed from the logs upon a car for shipment; that Worden and Townsend were both present at the time he was engaged in loading, and Townsend kept talley of the lumber, and, after it was loaded, plaintiff told Townsend and Worden, as he testifies, that he wanted pay for his work, and they said they would like to have him wait until they got their returns from the lumber, and he

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refused, because there was a difference in their accounts, and then was the time to settle, and, if they did not, he would stop the lumber there; that they then looked over his account, and concluded it was correct. He told them he must have $15 to send to his wife in New York, and Townsend said he should have it, if he would wait for the rest until they got their returns for the lumber. He assented to this, and received the $15. He also showed that Townsend paid for sawing the logs into lumber, and that it was shipped to Detroit in his name for sale, and that he received the money for which the lumber was sold.

The testimony introduced on the part of the plaintiff was ample to warrant the jury in finding that defendants were jointly interested as partners in the transaction of dealing in black-walnut lumber from the purchase of the logs to the manufacture and sale of the lumber, and were liable as such for hauling the logs to the mill, and loading the same upon the cars.

At the close of the plaintiff's testimony the defendants' attorney moved the court to direct the jury to render a verdict for the defendants, which motion the court correctly refused.

The only witness produced and examined on the part of the defendants was defendant Townsend. He was permitted to testify, against plaintiff's objection, that he was not a partner of Worden in the business of hauling black-walnut logs. He testified that his arrangement with Worden was as follows:

"I told Worden I would go with him to see the logs and timber, and, if I thought it would do, I would advance him the money; and he was to pay me interest, and for my time I spent."

The defendant Townsend further testified that he was

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to have security for the money he let Worden have on the lumber until he got his pay; that he was to have no interest in the proceeds more than to reimburse him for his money, the interest upon it, and his time, and that he went with Worden to examine timber, and spent eight days; that nothing was said as to how much he was to receive a day, but he afterwards charged him $1.50; that he advanced Worden money to buy lumber and logs, and to pay plaintiff for putting in the logs; that he let Worden have money at different times to pay for this lumber, hauling, sawing, etc., and he gave a detailed statement of the sums he had paid directly to different persons for logs, and for hauling and for sawing, and to Worden, aggregating $337.36. From some of the persons from whom logs were purchased, Townsend obtained credit, or time in which to make payment, until after he should receive returns for the lumber. He also testified that the reason why the lumber was shipped or billed in his name was that he expected to receive the pay for the lumber before it was shipped, but, when he found otherwise, he had it shipped in his name; that he received a draft for the avails of $416.94; and he testified that the amount of advances made by him, including $2 for interest and $12 for his time, amounted to $414. He did not explain or account for the difference between the aggregate claimed to have been advanced by him and the amount as shown by his itemized statement.

Partnership liability, at the common law, takes the form of a joint obligation; and especially is this so with reference to third persons. In a proceeding to charge one person with a liability in conjunction with another, the issue is not necessarily upon the existence of a partnership between them, but upon the performance of an act to which the law attaches a joint obligation. Princ.

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of Partn. by Jas. Pars. § 44. The learned author further says:

"To admit the plea of no partnership as a defense, and as a corollary to compel the plaintiff to prove the existence of the relation, abrogates the law, by displacing the point of controversy, which is made to turn upon the fact of partnership *inter se*, instead of upon the liability of a man for his acts. The change reverses the order of proof. Every person who performs an act is liable, whether he is a partner or not."

The real test, in actions *ex contractu*, is a joint interest in the contract. Such joint interest makes the parties liable, whether they are partners or not. *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *Eastman v. Clark*, 53 N. H. 276; *Sager v. Tupper*, 38 Mich. 258.

All partners are co-principals, but all co-principals are not partners. Whether they are partners or not depends upon the nature of the act, and the kind and scope of the business in which the act was done; and in determining whether there is a joint interest in the contract the benefit accruing from the contract has an important bearing. The liability does not depend upon the intention of the party to assume the obligation. It is the performance of the act which creates the liability for the consequences, whether done by a single individual or by several. The undertaking carries with it the liabilities which arise out of the business, and they cannot be shaken off. Princ. of Partn. by Jas. Pars. § 45; *Moore v. Davis*, 11 Ch. Div. 261. The law charges the principals in a joint transaction as if they had contracted with each other to perform it. For an act done on behalf of several, the law charges all concerned in the transaction, whether known or unknown, without reference to any agreement, or absence of agreement, upon the subject of their liability. Id. § 46.

From all the testimony in the case, it appears that

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Worden and Townsend entered into an agreement to purchase black-walnut logs, have them hauled to a saw-mill, and there sawed into lumber. Worden was to do the buying and attend to the business, and Townsend was to advance the money for that purpose. They jointly examined the timber. Both engaged in treating for the purchase, in some instances. Worden referred the vendors for payment to Townsend, who paid for most of the purchases without the money passing through Worden's hands. He also paid some parties for hauling. He paid for the sawing. It was a part of the contract that he should advance the money to carry the business through. He took no chattel mortgage upon the lumber, but was to have a claim upon the lumber for his security; and out of the proceeds he was to reimburse himself for the money advanced, and interest thereon, and for his services in the carrying on the business venture. Nothing can be plainer than that it was a joint undertaking for their mutual benefit, and that he was a co-principal in the transaction, and as such liable to plaintiff for the balance due him for hauling the logs. The plaintiff was entitled to have his first request given to the jury, which was that, under all the evidence, the plaintiff was entitled to recover.

The statute of frauds was not applicable to the case. The promise of Townsend to plaintiff to pay him the balance due him for hauling and loading was not the promise to answer for the debt or default of another, but it was a promise to pay his own debt, and one which, in his agreement between himself and Worden, by his own testimony, he had agreed to advance the money to pay. It does not matter whether, technically, as between Townsend and Worden, he was a partner or not. He was jointly interested with Worden, in all the contracts, as a principal; and calling him a partner with Worden

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does not change or limit his liability as a co-principal with Worden in the venture.

The facts stated by Townsend do not make him a mere lender of money to Worden. The fact that Worden was totally irresponsible would not incline one to believe that Townsend placed the money advanced absolutely in Worden's hands, which is the test whether it is a mere loan or partnership or joint venture. On the contrary, Townsend's testimony shows that he did not place the money absolutely in Worden's hands, and trust to his integrity to put it to the agreed use. He (Townsend) paid the purchase price of the logs in a majority of cases, and this whether he and Worden were together when the bargain was made, or whether Worden agreed for the purchase, assuming in this respect a control in the expenditure and management inconsistent with the relation of a mere lender of money to Worden. The question whether he was a mere lender of money to Worden, or a co-principal in the transaction, turns upon the destination and control of the fund. Townsend not only stipulated that the money should be retained and used in the business, but he managed and controlled the application of the money. Not only that, but he retained control of the lumber in which the money was invested. These acts determined the relation of Townsend with third parties dealing with Worden in pursuance of the common design of Worden and Townsend with reference to the lumber, and attached to Townsend the liability of a partner or joint contractor. The testimony discloses that Worden became indebted to plaintiff for a benefit moving directly and simultaneously from plaintiff to Worden and Townsend, and the same cause which made Worden a debtor to plaintiff necessarily made Townsend a debtor also; and therefore they are jointly liable as partners.

Upon the trial the court regarded the transaction in

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relation to buying the logs as so different from the contract to haul the logs to the mill that he struck out the testimony of the witness McNeal relative to Worden and Townsend bargaining with him for the purchase of black-walnut trees in which both took part. In this he erred. The purchase of the timber, and the hauling to the mill, were parts of one business transaction, in which these parties were engaged; and what Townsend did and said in reference to the purchase had a tendency to prove that he was a principal with Worden both in purchasing and in having the logs hauled to the mill. The purchase would be futile unless the logs were taken to the mill where they were to be sawed. For the same reason the court erred in excluding the answer of the witness Baxter to the question: "State what was said."

Plaintiff's third request was as follows:

"If the jury find that defendant Townsend was to or did reap the benefit, or a portion of the benefit, from the lumber transaction, and was jointly interested with Worden in the lumber, he is liable with Worden for the labor of plaintiff."

The court refused to give this request. It should have been given.

What we have said in reference to the law which should be applied in this case renders it unnecessary to particularize the instructions given by the court to the jury upon which error is assigned. Such portions of the charge as are not in harmony with what we have stated as the law are overruled.

The judgment is reversed, with costs, and a new trial granted.

The other Justices concurred.

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WILLIAM KOEPKE v. JOSEPH P. DYER.

Mechanics' lien law—Judgment—Personal liability.

In this case, the judgment, so far as it establishes a personal liability against the defendant, is affirmed, but is held void so far as it gives plaintiff a lien under the mechanics' lien law of 1887, which was held unconstitutional in *John Spry Lumber Co. v. Loan & Trust Co.*, 77 Mich. 199.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued April 16, 1890. Decided April 25, 1890.

Proceedings under mechanics' lien law of 1887. Defendant brings error. Reversed as to lien. Personal judgment affirmed. The facts are stated in the opinion.

Earle & Hyde, for appellant.

Nathan P. Allen, for plaintiff.

MORSE, J. April 4, 1889, the plaintiff filed his declaration against the defendant in the superior court for the city of Grand Rapids, in *assumpsit*, alleging that on February 19, 1889, he filed with the register of deeds of Kent county a notice of claim of lien for labor performed and materials furnished on and against certain lands in Davis, Turner & Carroll's addition to the city of Grand Rapids, the true amount of said claim being $113.10, over and above all legal set-offs. He also declared upon all of the common counts. A copy of the declaration and notice of rule to plead was personally served on the defendant in the city of Grand Rapids April 5, 1889. July 1, 1889, his default for want of appearance and pleading was taken, which was made absolute July 8, 1889. July 19, 1889, judgment was taken on this default

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before the court without a jury for the sum of $113.10, and the said amount declared by said judgment to be a lien upon the real estate described in the declaration. Execution was issued on this judgment July 23, 1889. August 7, 1889, the defendant appeared specially by his attorneys, Earle & Hyde, and moved the court to set aside said judgment and execution for various specified reasons. September 9, 1889, this motion was denied. This case is brought here upon writ of error.

After the judgment was taken, the mechanics' lien law of 1887 was declared unconstitutional by this Court. *John Spry Lumber Co. v. Loan & Trust Co.*, 77 Mich. 199; *Mellis v. Race*, 78 Id. 80; *Snell v. Race*, Id. 334. All the objections to this judgment in the court below, on motion to set it aside, and all the errors assigned in this Court, are directed against the proceedings to enforce the lien. The declaration upon the common counts and the record will support a personal judgment in *assumpsit* for the amount of $113.10, and there is no reason for setting it aside. *Snell v. Race, supra.* The execution, however, was directed against the premises upon which the lien was established, and is void and of no effect, and must be set aside.

The judgment, in so far as it creates a lien upon the premises, is vacated and set aside, but the personal judgment against the defendant will stand. The defendant will recover his costs in this Court.

The other Justices concurred.

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JOHN D. HAMILTON v. WILLIAM W. POWERS AND CHARLES W. POWERS.

Bills and notes — Indorsement — Pleading — Declaration — Notice — Amendment.

In this case the indorsements appearing upon the notes received in evidence were not correctly set up in the declaration; and it is held that an amendment should have been allowed in the furtherance of justice, if asked for, which was not done, and the judgment is reversed.

Error to Oceana. (Dickerman, J.) Argued April 16, 1890. Decided April 25, 1890.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

James Brassington, for appellant.

Rutherford & Sackrider (*W. E. Ambler,* of counsel), for plaintiff.

LONG, J. This suit was brought in Oceana county on two promissory notes. The defendants were copartners in business under the firm name of Powers Bros., and were payees in and indorsers upon the notes. The declaration was on the common counts in *assumpsit.* The notes and indorsements were set out in the declaration, under the usual notice, as follows:

"$1,500. FERRY, OCEANA COUNTY, MICH., July 3, 1887.

"Three months after date we promise to pay to the order of Powers Bros., fifteen hundred dollars at J. D. Hamilton & Co.'s office, Campbell, N. Y. Value received.

"FOGG & HIGHTOWER."

Indorsed on back as follows:

"Pay to the order of Knox & Hamilton. POWERS BROS."

"KNOX & HAMILTON."

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"Pay S. H. Storrs, cashier, or order. J. D. HAMILTON & Co."

"1,500. FERRY, OCEANA COUNTY, MICH., August 8, 1887.

"Three months after date we promise to pay to the order of Powers Bros., fifteen hundred dollars, at J. D. Hamilton & Co.'s office, Campbell, N. Y. Value received.

"FOGG & HIGHTOWER."

Indorsed on back as follows:

"Pay to the order of Knox & Hamilton. POWERS BROS."

"Pay Hamilton, Martin & Co., or order."

"Pay S. H. Storrs, cashier, or order."

The plea was the general issue. On the trial plaintiff called Charles A. Knox as a witness, who testified that he was familiar with the signatures of Fogg & Hightower, and that they signed the notes; that he saw Powers Bros. sign the indorsements thereon; and that, after their indorsement by Powers Bros., he sent the notes to the plaintiff for discount. Plaintiff then offered the two notes in evidence. Defendants' counsel objected to their introduction in evidence on the ground that—

"It was incompetent under the pleadings, a copy of the indorsements served on the defendants not being a true copy of the indorsements now on the note, and that the title of note, as shown by the indorsements given in the declaration, is shown to be in some one else."

This objection was overruled, and the notes received in evidence. Plaintiff then offered the indorsements of Powers Bros., and the certificates of notice and protest, and proved the signatures on the back. This was received subject to the same objections. The certificate of demand and protest was in the usual form, and sufficient to hold the indorsers.

The record presented to us shows that the following indorsements appeared upon the back of the notes. On the first:

"Pay to the order of Knox & Hamilton. POWERS BROS."

A line was drawn across the following indorsement:

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"Pay Hamilton, Martin & Co. or order.

"KNOX & HAMILTON."

And the following indorsement:

"Pay John D. Hamilton or order. KNOX & HAMILTON,"—

Was not put in evidence, and is not stricken out.

On the second note appeared the following:

"Pay to the order of Knox & Hamilton. POWERS BROS."

A line was drawn across the following indorsements:

"KNOX & HAMILTON."

"Pay S. H. Storrs, cashier, or order.

"J. D. HAMILTON & CO."

A line was drawn across the following indorsement:

"Paid by and the property of J. D. Hamilton.

"J. D. HAMILTON & CO."

The following indorsement was not stricken out, and was not put in evidence:

"Pay John D. Hamilton or order. KNOX & HAMILTON."

Plaintiff then recalled the witness Knox, who gave testimony, under defendants' objection, showing that the notes were the property of John D. Hamilton, the plaintiff, at the time of the commencement of the suit. He also testified that after the notes were executed and indorsed by Powers Bros., he sent them forward to J. D. Hamilton for Powers Bros., and procured the money on them.

Errors are assigned upon the rulings of the court in admitting the notes in evidence, and also in permitting the plaintiff to give parol evidence of the ownership of the notes. It is insisted that the plaintiff should not have been permitted to put the notes in evidence, for the reasons:

1. That the indorsements set out, under the notice, did not show title to the notes in plaintiff.
2. That the indorsements upon the notes did not correspond to the indorsements set out in the declaration.
3. That the plaintiff did not offer the indorsements of Knox & Hamilton to the plaintiff appearing upon the notes in evidence, and the admission of parol evidence to show title in the plaintiff was incompetent.
4. That the notices of protest show that at the time of

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the protest the title to the notes was in the bank of Campbell, of New York.

5. That, the suit being brought against the indorsers alone, without joining the makers, plaintiff should have declared specially in a count of indorsee against indorser.

6. That the defendants had a right to rely, and did rely, upon the copies of notes and indorsements appearing in the declaration, which showed the title in third parties.

It appears, from an examination of the indorsements upon the notes as they were put in evidence, that Powers Bros. indorsed them over to Knox & Hamilton, and that Knox & Hamilton indorsed them to John D. Hamilton, the plaintiff, and that the other indorsements had been stricken out. These indorsements, therefore, as they appeared upon the notes, placed the legal title in the plaintiff. The defendants could not object to the indorsements made and stricken out. They were in no manner affected by them. They were the payees and first indorsers, and the notes were discounted by them for value to the plaintiff in this case. They do not deny liability upon the notes, except such as is drawn from their plea of the general issue. They do not deny the execution of the notes, but admit it by the plea, and the only point contained in their objection worthy of any notice is that the declaration does not set out these indorsements as shown upon the notes, and the failure of plaintiff to put in evidence the indorsement of Knox & Hamilton to John D. Hamilton, the plaintiff. The fact of such indorsement appears upon the notes, but it is conceded by the record presented to us that plaintiff failed to introduce the same in evidence; so that the case, as made, showed the title in Knox & Hamilton, and not in the plaintiff, unless it was competent to show it by the parol evidence.

No motion appears to have been made to amend the dec-

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laration by stating these indorsements under the notice. As it appears, however, under the notice, Knox & Hamilton's indorsement of the first note was in blank, and the suit could have been maintained in the name of the plaintiff upon that, as he had the right to make it payable to himself by proper indorsement of the necessary words therefor, and, being the owner and holder, could maintain the suit in his own name. As to the other note, the title stood, so far as shown by the indorsements under the notice in the declaration, in Knox & Hamilton. In the furtherance of justice the court should have allowed an amendment to the declaration if asked, in those particulars. As no recovery could be had as the declaration stands, a new trial must be awarded. It is not, therefore, important to determine whether the parol evidence was competent for the purpose of showing the title in plaintiff.

The judgment of the court below must be set aside, and a new trial ordered, with costs.

The other Justices concurred.

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LEWIS PEARL v. CHARLES WALTER ET AL.

Fraud—Bohemian oat note—Action by defrauded party.

1. This case is ruled by *Hess v. Culver*, 77 Mich. 598.
2. It must not be considered that the remarks of this Court in *Davis v. Seeley*, 71 Mich. 213, in which the Bohemian oat note scheme is declared to be a "transparent fraud," were intended to cut off *all* men from relief as against the chief swindlers in those transactions. The law takes note of the ignorant, the credulous, and the unwary, and will make their ignorance and want of cunning their innocence, and protect them.

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Error to Clinton. (Moore, J., presiding.) Argued April 16, 1890. Decided April 25, 1890.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

J. O. Selden, for appellant.

Spaulding & Walbridge and *Will H. Brunson*, for defendants.

MORSE, J. This case, as presented by the plaintiff's declaration, is so nearly like that of *Hess v. Culver*, 77 Mich. 598, as to be governed by it.

The suit was commenced by summons in the circuit court for Clinton county. No service was obtained upon defendant Wright, and he did not appear. The other defendants appeared by separate attorneys. Declaration was filed May 12, 1888, to which defendant Walter demurred on the 17th of the same month. September 1, 1888, defendant Bailey filed his plea of the general issue. November 26, 1888, the circuit judge, Hon. V. H. Smith, overruled the demurrer of Walter, and February 16, 1889, he pleaded the general issue. October 14, 1889, the case came on to be tried before Hon. J. B. Moore, presiding judge, and a jury was impaneled and sworn. Upon the offer of testimony by the plaintiff to support his declaration, the defendant Bailey objected for the reason that such declaration did not set forth any cause of action, and was insufficient in law. The judge, after hearing arguments, decided the objection to be well taken, and directed a judgment for the defendants.

The only material difference between the present case and that of *Hess v. Culver, supra,* is that the plaintiff received the oats, which were of some value, but this cannot alter or diminish the fraud, except as regards the damages. It is claimed, also, that plaintiff knew the

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scheme was a fraud when he went into it, and therefore should not be permitted to recover on grounds of public policy; that this knowledge sufficiently appears from the declaration, but, independent of that, it ought to be presumed that he knew that the oats could not be sold for $15 per bushel, except by perpetrating a fraud upon a third party.

It has been said by this Court in two cases that this Bohemian oat scheme carried upon its face the evidence of its fraud. *McNamara v. Gargett*, 68 Mich. 454; *Davis v. Seeley*, 71 Id. 209. But we have also recognized the fact that, transparent as it seems to us, it has yet been accepted by thousands in this State, many of whom did not understand its true character, and had no suspicion of wrong, and that it is—

"So cunningly devised that, in the hands of a sharp, shrewd, designing man, hundreds of the unwary have been defrauded." *McNamara v. Gargett*, 68 Mich. 459, 460.

And we also said in *Hess v. Culver*, 77 Mich. 598:

"Where a man is defrauded, as often happens, by the misrepresentation of some one who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain."

The declaration shows that when the defendant Bailey first approached plaintiff upon the subject of buying these oats plaintiff told him that he was afraid of the scheme, and he thought there was something wrong about it. This is all there is in the declaration to show that plaintiff supposed he was to become a party to any fraud. The declaration charges a conspiracy to defraud him on the part of the defendants, and sets out the details of such conspiracy, and the acts and declarations of the conspirators in the accomplishment of their object, and we

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think a case is made against all of them. Bailey went to see plaintiff first. When the plaintiff doubted the rightfulness of the transaction, as above quoted, Bailey named a reputable attorney at Ovid, with whom he said he had consulted, and had been advised by him—

"That said Bohemian Oat Company's mode of doing business was legitimate, and that the dealing in said oats, as was being done in many places, was legal and all right."

He also stated that the defendants Walter and Wright were selling Bohemian oats for him. Afterwards Bailey sent Walter and Wright to plaintiff, and their representations induced him to buy the oats. Among other things, they represented that they were the agents of the "Bohemian Oat & Cereal Company of Ypsilanti;" that it was a legal and responsible corporation, incorporated under the laws of this State. They showed him a paper, purporting to be a certificate of the Secretary of State that the company was duly incorporated. They also presented him "a nicely printed paper, with a broad golden seal upon it, which they asserted and declared to be a bond" of said company, and said that if he would buy 30 bushels of said Bailey's Bohemian oats at $15 per bushel, and give Bailey his negotiable note for $250 at 14 months, with interest at 7 per cent., and a note for $200 to said Walter at 13 months, they would fill out the blanks in said bond and deliver the same to plaintiff. If the bond was not fulfilled, all the plaintiff would have to do would be to go to the State Treasurer at Lansing, with whom the company had deposited $100,000, and there he would receive the full amount of his damages. Relying upon these statements, which were false, the plaintiff bought 30 bushels of said oats, and gave his promissory notes as above, and he avers that he would not have bought said oats, or given his said notes, had he not believed said

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statements to be true, and had not the said bond been delivered to him.

The bond reads as follows:

"No. 432. Capital stock,..... $100,000.

"F. A. BOND.

HOME OFFICE,
Ypsilanti, Michigan.

"The Bohemian Oat & Cereal Company, incorporated under the Laws of the State of Michigan, December 21, 1884.

"Know all men by these presents that the Bohemian Oat & Cereal Company do hereby agree to sell 60 bushels of Bohemian oats for Mr. Lewis Pearl at $15 per bushel, in cash or by note, for which said Pearl is to pay 33⅓ per cent. commission for selling; said commission to be paid in notes for which said grain is sold; said grain to be sold on or before September 23, 1887; the price on this grain being a fictitious value for speculative purposes.

"In testimony whereof the said Bohemian Oat & Cereal Company has caused this bond to be signed and sealed by the superintendent of said company this 23d day of October, 1886.

"This company will not be held responsible for any outside contracts made by agents other than those expressed on the face of this bond. This bond is void without the company's seal and signature of superintendent.

"J. W. ORCUT, Superintendent."

It will be noticed that the selling of the oats to be raised by plaintiff was to be done by the company, and nowhere is it stipulated or agreed that plaintiff should in any way aid in such selling except to furnish the oats. We do not think plaintiff's part in the transaction shows upon its face any knowledge that a fraud was necessarily to be perpetrated upon any one else, or any intent upon his part to participate in any fraud upon third persons. It must be remembered that many people do not have the intelligence to discern a fraud as easily as those whose business it is to discover and punish frauds. The court may at a glance detect the swindle in a transaction which, plausibly disguised, may deceive many good and honest men, and the moral perception of one man may

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not be so quick and clear as that of another, and yet both may equally be honest in the sight of the law, and entitled to its protection. It must not, therefore, be considered that the remarks of this Court in *Davis v. Seeley*, 71 Mich. 213, in which this scheme upon its face is declared to be a "transparent fraud," were intended to cut off all men from relief as against the chief swindlers in these Bohemian oat transactions. The law takes note of the ignorant, the credulous, and the unwary, and will make their ignorance and want of cunning their innocence, and protect them. To do otherwise would put a premium upon villainy, if such villainy but reach its end by an appeal to the hope of gain, which animates us all, so plausibly and cunningly worded as to make the worse appear the better to one not skilled in the ways of the world.

In this case the plaintiff was a farmer, whose fear that the scheme was wrong was easily dispelled by what was said to be the counsel of a good lawyer, by the pretended certificate of the Secretary of State that the company was incorporated, and that what was to him an immense sum of money was deposited with the State Treasurer at Lansing, sufficient to pay all damages occasioned by the nonfulfillment of the obligations of the bond. It cannot be said as a necessary legal deduction that he knew that his part in the transaction would in the end swindle or defraud some one; nor in fact did it. It turns out that he alone in this transaction was defrauded. It may well be conceived that the plaintiff, under the representations made and the documents shown to him, did not stop to reason out the consequences beyond himself, and to consider that some time in the future, if his bond was fulfilled, somebody else must suffer loss to make his gain. What we may now see in the light of many cases like the one before us, or what a lawyer or other skilled busi-

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ness or professional man might have seen in such a scheme upon its presentation, cannot be held up as a guide and standard for all of our people. We must, in order to do justice, remember that this kind of swindling is practiced almost universally upon those whose means of knowledge and whose experience in the frauds and deceits of the world are limited within narrower bounds than ours; and we are not authorized to take it for granted, as argued by counsel, that every honest man would at once discover the fraud in this Bohemian oat scheme.

It is argued very strenuously by the counsel for the defendant Bailey that the declaration does not show that he made any representations upon which the plaintiff relied; that such representations were made entirely by Walter and Wright. But as Bailey was selling his own oats, and delivered them to plaintiff, and first called upon plaintiff to sell them, and there stated that Walter and Wright were selling oats for him, and afterwards sent them to plaintiff, we are satisfied that he was the main man in the concern, and responsible for all that was done or said by any of the defendants.

The judgment must be reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

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MARY A. KEATING v. BENJAMIN S. RETAN.

Chattel mortgages—Filing—Evidence—Fraudulent conveyances.

1. The production of the record-book of chattel mortgages from the proper office, upon which is found the entry of the filing of a chattel mortgage, as of a given date, in its regular order, accompanied by the testimony of the clerk that the mortgage was among the files of chattel mortgages in his office until about the time of the trial, when it was delivered to the attorney of the party producing it, is sufficient evidence of the making of such entry and of the filing of the mortgage at the date named.
2. In a suit between the holder of a chattel mortgage and an attaching creditor of the mortgagor, who attacks the mortgage as fraudulent as to creditors, testimony tending to prove that the mortgagor entered into a fraudulent arrangement with certain *other* creditors, with respect to *other* personal property, is properly excluded.

Error to Shiawassee. (Newton, J.) Argued April 17, 1890. Decided April 25, 1890.

Trover. Defendant brings error. Affirmed. The facts are stated in the opinion.

Watson & Chapman, for appellant.

S. F. Smith, for plaintiff.

CHAMPLIN, C. J. The defendant is a constable and as such attached certain chattels as the property of one Phillip Fauth.

The plaintiff held a chattel mortgage upon the attached property, executed by Phillip Fauth to secure the payment to plaintiff of $125 for that sum loaned to Fauth at the time he executed the mortgage. The defendant assails the validity of the mortgage, which was filed before

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the attachment, as fraudulent and void as to the creditors of Phillip Fauth. He also claims that the mortgage was not properly filed in the clerk's office of the city of Owosso, where the parties resided, so as to give it any validity as against the creditors of Fauth.

The testimony shows that on the day the mortgage was executed it was delivered to Mrs. Keating, and Fauth then said he would take it to the city clerk's office, and have it filed. The mortgage was produced by the plaintiff at the trial, and read in evidence, and also the following indorsement upon the back thereof:

"Filed November 22, 1888, at 10 o'clock A. M.
"CHARLES HOWE, Deputy Clerk."

The mortgage was dated November 21, 1888. The defendant claims that the city charter did not provide for or authorize appointment of a deputy clerk.

It appears from the testimony that the mortgage was among the files of chattel mortgages in the city clerk's office until about the time of the trial, when it was delivered to plaintiff's attorney. The record-book of chattel mortgages was produced by the city clerk who succeeded the one in office at the time the mortgage was filed, and the entry of the filing of the mortgage on November 22, 1888, there appeared in regular order. This testimony was sufficient to show that the mortgage was filed and the proper entries made upon the book on November 22, 1888, and such entry and filing was sufficient in law to protect the rights of the mortgagee, and entitle her to the benefit of the statute as to notice of such rights.[1]

Complaint is made by the defendant's counsel that he was not permitted, upon the cross-examination of plaintiff's witnesses, to exercise sufficient latitude in his

[1] The attachment was levied November 23, 1888.

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endeavor to show fraud. The testimony excluded was not such as tended to show that the mortgage in question was fraudulent, but that the mortgagor had committed fraud in dealing with his other creditors. The court exercised a fair discretion, and was right in holding that the defendant must prove that the transaction between Fauth and plaintiff was fraudulent as to creditors; and testimony which tended to prove that Fauth entered into a fraudulent arrangement with certain of his other creditors, with respect to other personal property, was not admissible under the issue in this case between these parties.

Defendant alleges error in the charge of the court wherein he told the jury that the entries of mortgages in the city clerk's record book showed a mortgage entered on November 20, which was the last entry before the one in question, and in the third line below there was another entry of December 26, 1888, and after that three other entries between other parties. Defendant's counsel insist that these entries were not offered in evidence, and it was improper for the court to call attention to them or comment upon them. The record before us does not show that such entries were offered or read in evidence. But the testimony, independent of these entries, tended strongly to show that the mortgage was filed and entered on November 22, and there was no conflicting or opposing testimony, and consequently nothing which would have warranted the jury in finding that it was not filed and entered on that day. The error, therefore, was not prejudicial to defendant, and does not call for a reversal of the judgment.

It is claimed that the circuit judge laid down a rule of damages which was applicable only in case the value of the goods was less than the amount of plaintiff's lien, and that the jury rendered a verdict for a larger amount; but

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upon inspection of the record it appears that the jury returned a verdict only for the amount of plaintiff's claim, and it is therefore unnecessary to discuss the error assigned upon this portion of the charge.

The judgment is affirmed.

The other Justices concurred.

The Superintendents of the Poor of Clinton County v. Samuel Jury et al.

Poor persons—Support by relatives.

The proceedings in this case were commenced under How. Stat. chap. 41, to compel the respondents (plaintiffs in *certiorari*) to maintain their aged and infirm father, and an order was made accordingly, which is sought to be set aside for want of evidence to warrant the court in making it; and it is held that there was some evidence introduced on the hearing, which was in open court, which warranted the order complained of, and it is affirmed.

Certiorari to Clinton. (Daboll, J.) Argued April 17, 1890. Decided April 25, 1890.

The nature of the case is stated in the head-note, and the facts in the opinion.

Auten & Moss and *Norton & Brunson*, for respondents, and plaintiffs in *certiorari*.

Charles M. Merrill, for petitioners, and defendants in *certiorari*.

Long, J. This is a proceeding by *certiorari* to set aside an order made by the circuit court of Clinton

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county, compelling the defendants to pay the sum of $3.90 per week for the support of their aged and infirm father. The proceedings to compel such payments were commenced under chapter 41, How. Stat., entitled "The Support of Poor Persons by their Relatives." The only question raised on the hearing here is that there is no evidence to warrant the making of the order. The case was heard before the court, and testimony taken in open court, and that court made the finding. It would profit no one to set forth the evidence here. We are satisfied that some evidence was introduced on the hearing which warranted the order made.

The order will be affirmed, with costs.

The other Justices concurred.

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THE CITY OF OWOSSO v. WILLIAM RICHFIELD ET AL.

Eminent domain—Street-opening case—Jury—Oath—Notice—Constitutional law.

1. Art. 18, § 2, of the Constitution, provides for a jury of twelve *freeholders* where private property is taken for the use of the public, and a provision of a city charter that the jury, in such a case, shall be composed of twelve inhabitants of the city, qualified to serve as jurors in courts of record, is repugnant to such constitutional provision, such jurors not being required to be freeholders.
2. The oath administered to the jury in a street-opening case is the measure and limit of their legal action, and must plainly require them to determine the *necessity* of taking the land sought to be acquired for *public use;* and an oath which simply requires the jury "to ascertain the necessity for *using* the property intended to be taken, if it be intended to take any, for such improvement," is not sufficient.

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3. A city charter which requires the marshal to make his return of the service of notice in a street-opening case *at least* six days before the day appointed for the hearing means six *full* days.
4. A charter provision requiring that notice of a resolution in a street-opening case, and of the proposed action thereunder, shall be posted in some conspicuous place upon the property intended to be taken, where substituted service is required, is construed as requiring such notice to be posted on the land of the absent respondent.
5. A resolution in a street-opening case is held fatally defective because not containing the separate descriptions of the land proposed to be taken, and the names of the several owners. *Railroad Co. v. Sanford*, 23 Mich. 418.

Certiorari to Shiawassee. (Newton, J.) Argued April 16 and 17, 1890. Decided April 25, 1890.

The respondent Richfield appealed from proceedings taken to lay out and establish a street in the city of Owosso, and brings *certiorari* to review such proceedings, which were affirmed on such appeal in the circuit court. Proceedings quashed. The facts are stated in the opinion.

Watson & Chapman, for plaintiff in *certiorari*.

S. F. Smith, for petitioner, and respondent in *certiorari*.

GRANT, J. This is a *certiorari* to the circuit court for the county of Shiawassee, to determine the validity of certain proceedings taken before a justice of the peace, for the purpose of establishing and opening a street, and condemning the lands of defendant and others for the use thereof.

The common council passed a resolution declaring that they deemed the establishing and opening of the street a necessary public improvement, describing the proposed street by metes and bounds, and fixing the time when the council would apply to Newton Baldwin, one of the justices of the peace,—

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"For the drawing of a jury to ascertain the necessity for using the property so as aforesaid intended to be taken for such improvement, and to ascertain the just damages and compensation to be paid to the owners."

The resolution further provided for publication of the resolution.

Application was made to said justice September 26, 1889, the day fixed by the resolution. Nine persons owned the different parcels of land proposed to be taken; Richfield owning lots F. and G. The marshal of the city made service upon the different owners. Richfield was a non-resident, and could not be found. The marshal returned that fact, and that he made service "by posting notice on premises." The marshal was directed and sworn by the justice to summon 24 disinterested persons, residing in the city of Owosso, and qualified to serve as jurors, wherefrom to form a jury. A jury was selected, and were sworn—

"To faithfully, impartially, and to the best of their ability, discharge the duty imposed upon them in ascertaining the necessity for the taking of private property for public use in the intended improvement, deemed necessary by the common council of the city of Owosso, in the resolution adopted August 19, 1889."

The jury made their report laying out the street and awarding damages, which report was confirmed by the justice. Richfield thereupon appealed to the circuit court, in accordance with the provisions of the charter, and that court affirmed the proceedings.

The proceedings were absolutely void for various reasons.

1. Article 18, § 2, of the Constitution, provides that,—

"When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, * * * shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than

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three commissioners, appointed by a court of record, as shall be prescribed by law."

The charter of the city of Owosso (section 109) provides that the jury shall be composed of inhabitants of the city qualified to serve as jurors in courts of record in this State. Jurors are not required to be freeholders.[1] It is of no consequence that the common council by their resolution determined that it was necessary to take the property for public use. Under our Constitution, that fact is left solely to the determination of a jury. This provision of the charter is therefore repugnant to the Constitution, and void.

2. The charter (section 114) provides that the jury shall ascertain the necessity for *using* the property intended to be taken, if it be intended to take any, for such improvement, and the just damages and compensation to be paid, etc. The oath administered by the justice to the jurors was substantially in the words of this provision of the charter. The provision of the charter of the city of Grand Rapids, and the oath administered to the jury in the case of *Powers' Appeal,* 29 Mich. 504, appear to have been the same as those in the case at bar. It was there held that the oath was the measure and limit of the legal action of the jury, and that no legislation could be sustained which did not plainly require this question to be left to the jury. Even if it could be maintained that the oath administered to the jury was in compliance with the Constitution, still we must hold that it was extra-judicial, because it was not such as was required by the provisions of the charter. Section 112.

3. The charter (section 107) requires that the marshal shall make his return at least six days before the day appointed for the hearing. The return was not made within this time, and the justice in consequence had no

[1] See How. Stat. § 7555.

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jurisdiction to proceed. In these proceedings all the provisions of the statute must be strictly followed, or jurisdiction fails.

4. The charter providing for a substituted service in case the owner could not be found was not complied with.[1] The return of the marshal does not show that he posted the notice upon the land of Richfield. Posting notice upon any other land embraced in the proposed street would not be such as the statute contemplates. The object of this substituted service is that it may be seen by some agent or friend of the owner, and that in this way he may receive actual notice.

5. The proceedings were fatally defective, in that the resolution, which is in reality the petition presented to the justice, did not contain the separate descriptions of the land proposed to be taken, nor the names of the owners. *Chicago, etc., Railroad Co. v. Sanford,* 23 Mich. 418.

The judgment of the court below must be reversed, and the proceedings quashed.

The other Justices concurred.

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WILLIAM SMITH ET AL. v. BENJAMIN W. PINCH ET AL.

Mutual benefit associations—Life insurance—Wager—Public policy—Accounting.

1. Act No. 187, Laws of 1887, revising the laws providing for the incorporation of co-operative and mutual benefit associations, only applies to corporations organized under it, and cannot be

[1] The charter provided for posting the notice in some conspicuous place upon the property intended to be taken.

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made to apply to insurance contracts made or attempted to be made prior to its enactment.

2. A contract of insurance upon a life in which the beneficiary has not an insurable interest is a wager upon the life of the assured, and void as against public policy.

Appeal from Calhoun. (Hooker, J.) Argued April 18, 1890. Decided April 25, 1890.

Bill for an accounting for money paid on a life-insurance policy. Complainants appeal from decree dismissing bill. Decree affirmed. The facts are stated in the opinion.

Jesse M. Hatch and *John C. Patterson*, for complainants.

Shriner & Fox, for defendants.

CHAMPLIN, C. J. This case comes before us upon a general demurrer for want of equity to the complainants' bill of complaint.

The bill is filed by the heirs at law and the administrator of Abigail Smith, deceased. It charges that the Old Peoples' Mutual Benefit Society of Elkhart, Ind., a corporation of the state of Indiana, and doing business in Michigan, on August 1, 1883, issued a policy of insurance upon the life of Abigail Smith, then residing in Lee, Calhoun county, Mich., insuring her life for the sum of $3,000, payable upon her death to Elvira Smith, of Walton, Eaton county, and that Abigail Smith died October 18, 1887.

The bill further states and charges that Elvira Smith was a daughter-in-law of Abigail Smith, but that Abigail was not a member of Elvira's family, nor dependent upon her for support, nor a debtor, and that Elvira Smith had no insurable interest whatever in the life of Abigail Smith.

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That at the time the application was made and policy issued Abigail Smith was over 70 years of age, and was incompetent and incapable, in law, of making contracts, and was then under guardianship; and that she never made or signed the application for insurance, and never paid any of the premiums, but such premiums were paid by said Elvira Smith and Benjamin W. Pinch.

That since the death of Abigail the heirs at law and administrator have claimed the money due on said policy, and have notified the insurance company not to pay it to any other persons; yet, notwithstanding, the said company has paid the moneys due and payable upon such insurance policy to Elvira Smith or Benjamin W. Pinch, her assignee, agent or attorney, and he now holds the same, and refuses to pay it over to the heirs at law of Abigail Smith, or to her administrator. It further states that the contract of insurance was made and executed in the State of Michigan, and by the charter and by-laws of the company Abigail Smith then and there became a member of the society, and possessed of all the rights and privileges of the society for herself and personal representatives, heirs, and assigns.

The Legislature of 1887, by Act No. 187, passed an act to revise the laws providing for the incorporation of co-operative and mutual benefit associations; which law went into effect on September 26, 1887. Section 16 of this act provides that corporations organized, existing, or doing business in this State under or by virtue of the provisions of that act should not issue any policy or certificate of membership upon the life of any person over the age of 65 years, nor upon any person not capable, in law, of making contracts, nor upon any life in which the beneficiary named has not an insurable interest; nor unless the person whose life is proposed for insurance shall have made and signed an application for such cer-

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tificate or policy. There are other restrictions and regulations in the section, and it contains the provision following:

"Any certificate or policy issued in violation of the above provisions shall be void as to the beneficiary therein named; but the amount thereof shall, in case of death, be payable to the heirs of the member."

The rights and equities of the heirs of Abigail Smith are based upon the above clause of the statute. It is admitted by counsel for all parties that the contract of insurance is utterly null and void, as against public policy; and counsel for complainants concede that, unless the above statute applies to this case, the contract cannot be enforced by complainants. The statute does not in its terms, nor by implication, apply to the policy or contract of insurance in this case. This so-called contract was made more than four years before the law of 1887 took effect. The act applies only to corporations organized under it, and this corporation was not. It is not retroactive in its terms, and cannot be made to apply to insurance contracts made, or attempted to be made, prior to its enactment.

The contract of insurance set up in the bill is against public policy, and void. Complainants are not parties to it, neither have they been injured by it. It could not be enforced between the parties in courts of justice; and the fact that one of the parties to the illegal contract has seen fit to pay over to the other the wager does not afford a basis in equity for outside parties to lay claim to the reward of iniquity.

It is stated in the bill that, by virtue of the application and issuing of the certificate, Abigail Smith became a member of the society, and that her life was insured by such certificate for $3,000, pursuant to the said charter, by-laws, and certificate of membership; and it is

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charged that on her death her administrators and heirs at law are entitled to the money. This position is inconsistent with the statement that Abigail Smith not only never signed the application, but was legally incapable of entering into a contract. But if she was by the proceeding constituted a member, the character of the transaction is not altered. The insurance was effected, and the beneficiary named had no insurable interest, and the contract was merely a wager upon the life of Abigail Smith, and cannot be enforced, without the aid of a statute authorizing it, either at law or in equity.

The decree dismissing the bill of complaint is affirmed, with costs.

The other Justices concurred.

DONALD MACLEAN v. PATRICK FITZSIMONS AND JOHN V. MORAN.

Contract—Construction—Bills and notes—Principal and surety—Fraud—Equity jurisdiction.

1. Complainant indorsed three notes for defendants' traveling salesman, due in one, two, and three years respectively, given to secure an alleged shortage of $2,000 in his accounts, defendants threatening to discharge him unless such shortage was paid or secured. Defendants *verbally* agreed, in case complainant would indorse the notes, to retain the salesman in his position, and retain from his salary $60 per month during each month until the maturity of the notes. At the request of the salesman, who was fully advised of the foregoing facts, complainant indorsed the notes, which were delivered to the defendants, who executed and delivered to complainant an agreement to retain the $60 per month, and indorse it on the notes. The salesman was retained for about four months, and the agreed

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sum applied on the notes, when he was discharged *without sufficient cause*, of which fact complainant had no notice or knowledge until after the maturity of the first note, he having relied upon the representations and agreement of the defendants in the premises. He thereupon filed a bill, setting up the foregoing facts, in which he prayed that he might be released from his indorsements, and that the notes might be delivered up and canceled, so far as the same affected him, and for an injunction to restrain defendants from enforcing the indorsements, and from transferring the notes, which were negotiable. The defendants demurred generally, claiming that the notes and written agreement must be construed together, and that they formed a complete contract, and could not be changed by parol evidence of contemporaneous agreements, which contract could not be construed into a promise to retain the salesman in their employment until the notes were paid.

In overruling the demurrer, the Court held that the circumstances surrounding the making of the notes are to be applied in arriving at the intention of the parties in entering into the agreement, and that what is plainly implied from the language used in the written agreement is as much a part thereof as if expressed therein; and that, applying these rules, there is no difficulty in deciding that it was a part of the *written* agreement that the salesman should be retained in defendants' employment until the notes were paid, subject to the contingencies of his voluntary leaving, or of his discharge *for cause*, or incapacity to work, or his death, in which event complainant would be bound by his contract of indorsement, discharged of all conditions.

2. In such a case equity has jurisdiction to grant the relief prayed for, irrespective of the solvency or insolvency of the maker of the notes, and thus prevent complainant's being made liable upon his indorsements by the transfer of the paper to *bona fide* holders, and from being harassed by suits in which he could not interpose the defense set up in his bill.

Appeal from Wayne. (Reilly, J.) Argued April 18, 1890. Decided April 25, 1890.

Bill to discharge complainant as indorser of certain notes, and for their cancellation, as far as his liability as indorser is concerned. Complainant appeals from decree dismissing bill on general demurrer. Decree reversed,

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with right to answer, etc. The facts are stated in the opinion.

Russel & Campbell (*Otto Kirchner*, of counsel), for complainant, contended for the doctrine stated in the opinion.

Keena & Lightner (*Don M. Dickinson*, of counsel), for defendants, contended:

1. The notes and contract must be construed together; citing *Sutton v. Beckwith*, 68 Mich. 303, 310; *McNamara v. Gargett*, Id. 454, 458; *Francis v. Barry*, 69 Id. 311; and they form a contract which cannot be varied by oral evidence of contemporaneous agreements; citing *Adair v. Adair*, 5 Mich. 209; *Savercool v. Farwell*, 17 Id. 308; *Martin v. Hamlin*, 18 Id. 364; *Hyde v. Tenwinkle*, 26 Id. 95; *Cline v. Hubbard*, 31 Id. 238; *Ortmann v. Bank*, 39 Id. 519; *Coon v. Spaulding*, 47 Id. 162; *Kelsey v. Chamberlain*, Id. 241; *Bearss v. Preston*, 66 Id. 15; *Walsh v. Martin*, 69 Id. 35.
2. Were the guarantee continuing, or for an indefinite amount, the fact of Beattie's greater indebtedness might release complainant; but nothing is alleged to show how Maclean is affected by the increased indebtedness. He was not liable for it, was not asked to pay it, and none of Beattie's salary was applied for that purpose. The fraud was committed by Beattie, and unless participated in by defendants, which is not alleged, complainant is not released; citing Baylies, Sureties, 276; *Casoni v. Jerome*, 58 N. Y. 315; *Ins. Co. v. Clinton*, 66 Id. 326; *School-dist. v. Dreutzer*, 51 Wis. 153; *Stoner v. Millikin*, 85 Ill. 219.
3. The discharge of Beattie was, so far as appears, a lawful act, and the surety is not released, though injuriously affected thereby; citing Brandt, Surety, § 200; *Ross v. Clore*, 3 Dana, 189; and it was the duty of defendants to discharge him, and they were not required to give complainant notice; citing Brandt, Surety, § 368, and cases cited; *Detroit v. Weber*, 26 Mich. 285.
4. The bill does not make a case calling for equitable relief, in this:

   a—Fraud is not sufficiently alleged. Impliedly it is admitted in the bill that defendants did not know of Beattie's larger shortage, and granting that they made the statements as alleged, they were honest about it; citing *Bridge Co. v. Van Etten*, 36 Mich. 210; *Conway v. Ellison*, 14 Ark. 363; and, in case of a written contract, representations made *bona fide* must be in the contract to be relieved against; citing *Turner v. Nav. Co.*, 2 Dev. Eq. 236; *Miller v. Cotten*, 5 Ga. 347.

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b—But equity does not interfere merely because fraud is alleged. The jurisdiction is limited (except in cases peculiarly equitable, as in fiduciary relations) by the requirement of inadequacy of a legal remedy; citing *Hagenbuch v. Howard*, 34 Mich. 3; *Teft v. Stewart*, 31 Id. 367; *Bridge Co. v. Van Etten*, 36 Id. 211; and in such cases an allegation of insolvency of the defendant is necessary; citing *Smith v. Short*, 11 Iowa, 523; *Tomlinson v. Rubio*, 16 Cal. 207; *Stevenson v. Fayerweather*, 21 How. Pr. 449.

5. In this case the defendants are thoroughly responsible, and there is no allegation to the contrary in the bill, and the claim of jurisdiction because two of the notes are negotiable, and not due, is untenable; citing *Thayer v. Swift*, Har. Ch. 433; *Edwards v. Mining Co.*, 38 Mich. 50; *Hile v. Davison*, 20 N. J. Eq. 228.

CHAMPLIN, C. J. The defendants interposed a general demurrer, for want of equity, to a bill of complaint filed by complainant, in which he states that, prior to October 6, 1885, defendants were copartners in the wholesale grocer business under the name of Beatty, Fitzsimons & Co., and had in their employ Robert Beattie as a traveling salesman; that, shortly prior to the date above, they had ascertained that Robert was behind in his accounts about $2,000, and threatened to discharge him unless he paid or secured them for the amount of the shortage; that Robert applied to complainant to indorse his notes in amount sufficient to cover such shortage, which complainant refused until he interviewed Fitzsimons in regard to the matter; that Fitzsimons represented to complainant that the sum of $2,000 was the total amount of Robert Beattie's indebtedness, and that, unless it was paid or secured, they would be obliged to discharge him, and that, if he would indorse said notes, they would retain said Robert in his position with said firm, and retain out of his salary the sum of $60 a month during each month until the maturity of the notes, and also keep up the premiums upon a policy of insurance upon the life of said Beattie during the same period; that said Fitzsimons also

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assured complainant that, by so doing, said Beattie would secure his position, and be enabled to earn a livelihood, and also make good the amount of his shortage.

That complainant, relying solely upon the representations of said Fitzsimons that the total of said Beattie's indebtedness was only $2,000, and that, if complainant would indorse Beattie's notes for that amount, said Beattie would be retained in his position, and enabled to pay the said indebtedness by having $60 deducted from his salary each month, indorsed three notes made by Beattie to said Beatty, Fitzsimons & Co., dated October 6, 1885,— one for $700, payable in one year; one for $700, payable in two years; and one for $600, payable in three years,— all bearing 7 per cent. interest, which notes were delivered to the defendants for the purpose above stated, and, as complainant is informed and believes, are still held by them; and the defendants thereupon executed and delivered to complainant the following instrument in writing:

"DETROIT, 6th Oct., 1885.

"DR. MACLEAN,—

"*Dear Sir:* Out of the monthly salary coming to Mr. Beattie we agree to retain sixty dollars ($60) per month, and indorse it on Robert Beattie's notes made and executed this day, and also to pay his premiums and assessments due on his life insurance during the time on which said notes are made on.

"Yours truly,

"BEATTY, FITZSIMONS & Co."

That after October 6, 1885, complainant heard nothing concerning said Beattie, and supposed that said defendants were carrying out their agreement as aforesaid, until October 9, 1886, when he received notice that the aforesaid note for $700, payable one year after date, had been pretested for non-payment; that he thereupon made inquiries of said defendants, and was informed by them

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that, for about four months after the making of said agreement and notes, said Beattie was retained in his position, and $60 deducted each month from his salary to be applied upon said debt. The bill further charges that,—

"At the end of said four months, said Beattie had been discharged, because, as defendants claimed, his shortage, instead of being only $2,000 at the time of making said agreement and notes, was in reality much greater. And complainant avers that said Beattie was discharged by said defendants at the time and for the reason above stated, and that his indebtedness was in fact largely in excess of the sum of $2,000, which fact defendants knew, or might have known, at the time said notes were given. And complainant further avers that said Beattie was discharged in violation of said agreement and of complainant's rights. Complainant shows that no information was given him concerning the discharge of said Beattie until he discovered it as above stated, although his position as indorser for said Beattie was very materially and injuriously affected by the same.

"That the retention of said Beattie was an essential part of the agreement under which he indorsed said notes; and, by the discharge of said Beattie without notice of any kind to complainant, the defendants deprived complainant of the security assured him by said agreement.

"That said agreement and indorsements were further based solely upon the express representations of defendants that said Beattie's debt to them did not exceed $2,000, which representations were false in fact; and, had complainant known that defendants had misstated the amount of said debt, he would not have indorsed the said notes.

"Complainant shows that the said defendants, by their false representations as to the amount of said debt, and by their subsequent discharge of said Beattie without notice to complainant, and for the sole reason that his debt proved to be greater than had been supposed, have so impaired the security of complainant for his said indorsements, and, by their neglect to inform complainant of the real amount of said Beattie's debt when they discovered the same, have by their own acts so altered the position of complainant as indorser for said Beattie,

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in a manner not contemplated by the said agreement, that complainant is of right discharged from all liability as such indorser, and is entitled to have his said indorsements canceled, and to be released from all liability on account of the same. Complainant avers that, by the violation of the terms of said agreement by defendants, he is released and discharged from all liability upon said indorsements, and is entitled to have the same canceled so far as the same affect him.

"And complainant shows that one of the notes so indorsed by him has already become due as aforesaid, and that the other two are liable at any time to be transferred by said defendants to third parties, who might hold the same and enforce them as *bona fide* holders against this complainant, unless the negotiation and transfer of said notes are enjoined by this court; and complainant is also exposed to the danger of having said defendants proceed against him at law on account of the note which has already become due, and upon the other notes at their maturity, if not paid by said Beattie, if not enjoined by this court."

The bill prays that complainant may be wholly released and discharged from his liability as indorser upon the notes, and that the notes be delivered up and canceled so far as the same affect him, and for an injunction against defendants' taking any steps to enforce said indorsements, and from indorsing or transferring said notes.

In support of the demurrer, the counsel for defendants contend that the notes and letter of October 6 must be construed together, and when so construed they form a complete contract, and cannot be varied by parol evidence of contemporaneous agreements; and, applying this doctrine to the case at bar, they say that the written contract cannot be construed into a promise to retain Beattie in defendants' employment until the notes were paid, because:

"1. The writing does not so state.

"2. There does not appear to have been any promise or obligation on Beattie's part to remain in the employment.

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"3. Such a construction is not reasonable. There would be no purpose whatever for Maclean's indorsement, in such case."

The bill sets forth the circumstances surrounding the making of the notes. The circumstances are to be applied in arriving at the intention of the parties in entering into the agreement; and it has been said that the true intent and meaning is to be derived from the four corners of the instrument. It is also true that what is plainly implied from the language used in a written instrument is as much a part thereof as if it was expressed therein. Construing the writings in the light afforded by the circumstances under which they were given, and giving effect to what is plainly implied by the language used, we have no difficulty in deciding that it was a part of the agreement that Beattie should be retained in defendants' employ until the notes were paid. It is also implied, necessarily, from what is stated respecting the situation of the parties, that Beattie did promise to remain in the employment of defendants for the purpose of paying said notes from his earnings. The agreement could not be carried out, otherwise. The very purpose for Maclean's indorsement was that Beattie should feel bound to stay in defendants' employment, and discharge his duty satisfactorily, in order to relieve his friend, who had become surety for him, from liability. If he voluntarily quit or left, or was discharged for sufficient cause, or had become incapacitated to work, or had died, complainant would be bound by his contract of indorsement, discharged of all conditions.

Beattie was discharged by the defendants without sufficient cause, according to the statement of the bill, and was thereby prevented from performing and paying the notes from the avails of his services.

Of course, in considering the allegations of the bill up-

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on general demurrer, all material facts stated, which are well pleaded, are taken as true and established. The bill upon its face makes a case for equitable relief. It would operate as a fraud upon complainant for defendants, after obtaining his indorsement upon the agreement that they would keep Beattie in their employment until the notes were paid by applying $60 a month of his salary to such payment, to discharge him without sufficient cause, and compel complainant to pay the notes.

It is urged that complainant has a complete remedy at law; that the invalidity of his indorsement is a defense at law, if sued upon the notes. The bill does not allege that Beattie is insolvent; and, if not, he has a complete remedy against him as the maker of the notes. Equity affords relief sometimes when there may be a remedy at law, if such legal remedy is inadequate or not immediately available. Here, if the notes not due should pass into the hands of a *bona fide* holder, complainant could not interpose the defense set up in his bill; and, to prevent being harassed by suits, and being made liable for the notes and costs, he has a right to have his indorsement canceled, and to injunctive relief against the transfer of the notes. This source of equity jurisprudence is sufficient to give the court jurisdiction, without considering the question of the solvency or insolvency of Beattie.

The decree of the circuit court should be reversed, and the cause remanded, with leave to defendants to answer in 20 days.

The other Justices concurred.

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JOHN L. KINNIE v. L. M. BARE, DRAIN COMMISSIONER.

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[See 68 Mich. 625.]

Drains—Law of 1885—Application—Notice of hearing—Adjournment.

In construing Act No. 227, Laws of 1885 (drain law), the following points are decided:

a—The primary petition for the construction of the drain need not state that it is necessary for the public health or highways; citing chap. 3, § 1; *Gillett v. McLaughlin*, 69 Mich. 547.

b—The application to the probate court is not required to be verified; citing chap. 3, § 5.

c—An application referring to the "annexed original determination of the drain commissioner," which contains a description of the land traversed by the drain, and of the drain, is sufficient.

d—The petition for the establishment of the drain need not contain an accurate description of *termini* and route for the proposed drain; citing chap. 3, § 3; *Kinnie v. Bare*, 68 Mich. 625.

e—Mortgagees do not come within the description of persons entitled to notice of hearing; citing chap. 3, §§ 6, 7.

f—The statute does not require the *hearing* of the application to be had within 40 days from its filing with the probate court; the court having power to adjourn the same; citing chap. 3, §§ 6, 8; and an announcement of such an adjournment made in open court is a sufficient notice to all parties who have been served with citation, whether present or not.

Error to Eaton. (Hooker, J.) Argued April 18, 1890. Decided April 25, 1890.

Certiorari to drain commissioner, from circuit court, to review his proceedings in establishing a drain. Judgment of circuit court, confirming such proceedings, affirmed. The facts are stated in the opinion.

Huggett & Smith, for appellant.

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Shriner & Fox, for defendant.

[The points of counsel are stated in the opinion.—REPORTER.]

CAHILL, J. The defendant, who is drain commissioner of the township of Benton, Eaton county, has laid out and established a drain in that township on an application signed by more than five freeholders residing therein. The proceedings for laying out such drain were removed by *certiorari* to the circuit court for the county of Eaton, and on a hearing before that court the proceedings were affirmed. The case is now brought to this Court by writ of error.

The objections to the proceedings, as shown by the affidavit for *certiorari*, are as follows:

"1. That the primary petition for the construction of said drain does not state that said drain is necessary for the public health or highways, or that the same is a public necessity."

This is not required by the statute. Act No. 227, Laws of 1885, chap. 3, § 1; *Gillett v. McLaughlin*, 69 Mich. 547.

The second and third errors are abandoned.

"4. That the application to the probate court is not sworn to or verified by affidavit of said commissioner or other person."

The statute does not require the application to the probate court to be sworn to. Act No. 227, Laws of 1885, chap. 3, § 5.

"5. That said application does not give a description of the land traversed by said drain, as required by law.

"6. That there is no description of said drain contained in the application to the probate court for the appointment of special commissioners."

The application refers to the original determination of the commissioner, which is annexed to the application as Exhibit B, and which contains a description of the

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land traversed. It also contains a description of the drain. We think this is sufficient, and that the point made by plaintiff, that the application to the probate court, in terms, "nowhere makes the order of determination a part of such application," is not well taken.

"7. That no petition was ever filed with the drain commissioner for the establishing of the drain mentioned and described in the order of determination of the commissioner."

This point is covered by the case of *Kinnie v. Bare*, which is a review of former proceedings for the laying of this same drain, reported in 68 Mich. 625. It is no longer necessary that the petition for the drain should contain an accurate description of *termini* and route for the proposed drain. Section 3, chap. 3, of the act of 1885, expressly provides that—

"In locating such drain the commissioner shall not be limited or confined to the precise starting point, route, or terminus set forth in the application."

In this case the drain, as laid, started on the same line as asked for in the petition, but some rods short of the point asked for.

"8. That no notice of the hearing of the appointment of special commissioners has ever been given or served upon all parties interested, as required by law."

The plaintiff claims that the following persons did not have notice of this hearing: Ellen Louise Abel, Sarah L. Abel, Sarah Marshall, James Sheperd, Freland H. Burns, Sarah J. Potter, John Hartell, and Henry Thrall. Of these persons, it appears that Ellen and Sarah Abel, Sarah Marshall, and James Sheperd are interested as mortgagees only; that Freland H. Burns has a leasehold interest of five years' duration, given in 1886. We do not think these persons were entitled to notice, under this statute. Section 6 provides:

"The court shall issue a citation to all persons whose lands are

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traversed by such drain, or who will be liable to assessments [assessment] for benefits in the construction thereof."

Section 7 requires:

"Such citation shall be personally served by the commissioner, or some other competent person, upon every person whose lands are traversed by such drain, or who will be liable to assessments for benefits in the construction thereof."

Mortgagees would certainly not come within the description of persons entitled to notice under this provision of the statute, nor does it appear that this lessee had such an interest as would entitle him to notice.

It appears by the return of the commissioner that Sarah J. Potter has released the right of way since the proceedings were taken; that her husband had previously released upon the mistaken supposition that he was the owner of the land; that, when attention was called to the fact that his wife owned it, she executed a release in her own name.

The plaintiff claims that John Hartell was the owner of the S. E. ¼ of the N. W. ¼ of section 23, in that township. To this point the commissioner returns that he was not informed as to whether John Hartell is the owner of such land, but, whether this is true or not, that the drain does not traverse such parcel, nor run within 60 rods of it; that said drain will not, in the judgment of the commissioner, benefit said described land, for the reason that it furnishes no outlet for it. We take this statement in the return as equivalent to a declaration that Hartell, if the owner of the land described, is not liable to assessments for benefits in the construction thereof. Taking this to be true, he was not entitled to notice.

"9. That the citation issued by said court was not served upon all the parties owning land, and interested therein, traversed by said drain, and liable for assessment in the construction thereof, as required by law."

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This point is covered by what we have said with reference to the eighth error assigned.

"10. That the hearing of said application for the appointment of three special commissioners was not had within 40 days from the time of filing thereof, as required by law."

The statute does not require the hearing to be had within 40 days. Section 6 provides that the day of hearing "shall be fixed at not less than thirty nor more than forty days" from the time of the commissioner's application, but section 8 provides:

"The court to whom such application is made shall, at the time and place fixed in the citation, or at any time to which it may adjourn, * * * proceed to hear," etc.

"11. That Henry Thrall, being named in said application to the probate court as a party interested, was not served with a citation for the hearing of said application and the appointment of special commissioners upon the day of their appointment."

It appears that in the original order made by the probate court the day of hearing was fixed for November 20, and that Henry Thrall was served with a citation for that day; that on the said 20th of November the hearing was, for cause shown, adjourned to December 6; and complaint is made in plaintiff's brief that Thrall, not being present, had no notice of this adjournment. But it appears that the adjournment was made by public announcement in open court, and no other notice to Thrall of such adjournment was necessary.

The 12th, 13th, 14th, 15th, and 16th assignments of error are within the points covered.

The judgment of the circuit court for Eaton county, confirming the proceedings of the probate court and of the drain commissioner of the the township of Benton in laying out and establishing said drain, is affirmed, with costs.

The other Justices concurred.

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NELS P. PETERSON v. WILLIAM TONER.

Malicious prosecution—Malice—Evidence—Damages.

1. In an action for malicious prosecution the plaintiff offered to show the circumstances of a difficulty that occurred between the parties three years before the trial, and the court excluded all evidence upon the subject, except of certain threats made by the defendant against the plaintiff, and the ruling is sustained under *Dillon v. People*, 8 Mich. 366; *Wellar v. People*, 30 Id. 22; *Patterson v. Garlock*, 39 Id. 449.
2. The defense in a case for malicious prosecution cannot be made out by proof that the prosecuting attorney acted in good faith in authorizing the prosecution.
3. Advice by a prosecuting attorney, based upon false statements of the defendant, is no defense in a suit for malicious prosecution.
4. The omission of the trial judge to charge the jury upon a point to which his attention is not called cannot be assigned as error in a civil suit; citing *Rankin v. West*, 25 Mich. 195.
5. Act No. 101, Laws of 1885, authorizing the assignment of errors on the charge of the court without exceptions to support them, does not cover an omission or refusal to charge.
6. Where the evidence in a suit for assault and battery and malicious prosecution showed that the defendant assaulted the plaintiff, who was a carpenter by trade, with an axe, and broke his wrist, and that he was laid up for three months, for which the jury awarded him $100, and that plaintiff lay in jail 10 days under the charge of the defendant, which the jury found was malicious, for which they awarded him $70, such amounts, though large, cannot be said to have been awarded *entirely* without evidence.

Error to Muskegon. (Dickerman, J.) Argued April 18, 1890. Decided April 25, 1890.

Case for assault and battery and malicious prosecution. Defendant brings error. Affirmed. The facts are stated in the opinion.

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Bunker & Carpenter, for appellant.

Chamberlain & Sessions, for plaintiff.

[The points of counsel are stated in the opinion.—REPORTER.]

CAHILL, J. The plaintiff sued defendant in the Muskegon circuit court, in an action on the case for assault and battery and malicious prosecution, and recovered a judgment before a jury for $100 on the former charge, and $70 on the latter.

The parties were neighboring farmers, living in the township of Dalton, in Muskegon county. They had not been good friends, but had had difficulty on different occasions, running back over a period of three years and over. On Sunday, November 18, 1888, the plaintiff started to cross defendant's premises, entering them from the highway through a gate, which he left open. He passed along the road leading to the defendant's house and barn to within a short distance of a small gate, through a fence enclosing defendant's house. Defendant saw him, and came out of the gate with an axe in his hand, and ordered him to go back and shut the gate. The parties disagree as to whether the defendant raised the axe, or came at the plaintiff in an attitude of striking him with it. The plaintiff testified:

"When I was six or seven rods from Toner's house, I saw him come out of a small gate, and there was an axe on the gate-post. He came within three or four rods of me, jumping, holding the axe up in his hands, and said, 'Get out of here.'"

The defendant denies that he raised the axe, but does not satisfactorily explain why he took it with him. While the defendant was yet some feet, and perhaps rods, from the plaintiff, the latter drew a revolver, and fired it. He says:

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"It was pointed towards Toner. I shot to scare him. I did not intend to hit him."

After the shot was fired, plaintiff started across a plowed field, towards a fence, carrying his pistol in his hand. Defendant also went across the field, endeavoring to intercept the plaintiff, still carrying the axe in his hand. After they reached the fence the testimony is conflicting as to what occurred. The plaintiff testified:

"After I fired the revolver I ran backwards six or seven rods or more, and jumped on the outside of the fence. Toner ran too, and jumped over the fence, and struck me on the head with the axe, four or five times on the wrist and arm. He broke some bones of the wrist."

The defendant denies this, and testified that he did not strike the plaintiff at all. The next day after this occurrence, the defendant went to the prosecuting attorney, and made a statement to him, upon which the prosecuting attorney ordered a complaint to be made against the plaintiff before a justice of the peace, charging him with an assault. The complaint was made, a warrant issued, plaintiff arrested, and brought up for trial before a jury. After the jury were sworn, and a witness was called and sworn, his counsel objected to any testimony on the ground that the justice had no jurisdiction to try the plaintiff on that charge. The justice sustained the objection, and the jury thereupon rendered a verdict of not guilty, and the plaintiff was discharged. It is for this prosecution that this action is brought in part. There are 31 errors assigned but they can all be passed upon under a few headings.

When the justice's docket was offered in evidence for the purpose of showing the criminal prosecution of the plaintiff, it was objected to on the ground of a variance between the declaration and the proof offered. It was

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claimed that the declaration alleged a trial on the merits, and consideration of the testimony by the jury, and an acquittal on the merits, whereas it was claimed the docket showed that no evidence was introduced, and that the prisoner was discharged by the justice on his ruling that he had no jurisdiction. The declaration on this point is as follows:

"And the said defendant, under and by virtue of said warrant, afterwards, to wit, on the 19th day of November, A. D. 1888, maliciously, wrongfully, and unjustly caused this deponent and procured him, said plaintiff, to be arrested of his body, and to be imprisoned, kept, and detained in prison for a long space of time, to wit, for the space of ten days, and until the said William Toner, afterwards, to wit, on the 30th day of November, A. D. 1888, falsely and maliciously caused and procured this plaintiff to be carried and brought in custody before the said Lewis M. Miller, and to be tried by a jury duly impaneled in the court of said justice, Lewis M. Miller; which said jury, having heard and considered the evidence against this plaintiff touching and concerning the said supposed offense, then and there, to wit, on the 30th day of November, A. D. 1888, adjudged and determined that this plaintiff was not guilty of the said supposed offense, and then and there rendered a verdict of not guilty; and then and there the said justice caused this deponent to be discharged out of custody, fully acquitted and discharged of the said supposed offense."

The docket entries showing the result of this prosecution are as follows:

"That jury was then sworn to try said cause, and I proceeded to try said cause. William Toner was sworn as a witness for the prosecution. Counsel for defendant objected to the admission of any evidence in the case, because the justice has no jurisdiction to try the offense charged in the warrant. Objection sustained, and the jury thereupon rendered a verdict of not guilty, and I discharged the defendant."

The part of the declaration, above quoted, which is

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not mere recital, is so much as alleged that the plaintiff was acquitted by the verdict of the jury, and discharged out of custody, fully acquitted of said offense. There was no variance between the pleading and the proof to this extent; the proof showed substantially what was alleged in the declaration.

The assignments Nos. 2, 3, 4, 6, 7, and 8 all relate to the admission of testimony concerning former trouble between the parties for the purpose of showing malice in making the assault. It is conceded that a fact occurring at or about the time of the assault complained of, having a tendency to show malice, would be admissible, but it is objected that the plaintiff was allowed to put in testimony of acts occurring three or four years prior to that time, and that such proof could not have had a legitimate tendency to show malice at the time it was claimed that the assault was committed which gave rise to this action. As we read the record, there were two classes of proof offered on this subject. First, the plaintiff offered to show by the witness Staples the circumstances of a difficulty that occurred between the parties three years before. Upon objection of defendant's counsel, the court excluded all evidence upon this subject, except of certain threats made by the defendant against the plaintiff. The defendant had no cause to complain of this ruling. The circumstance inquired about was not more remote than has been allowed to be shown under former rulings of this Court. *Dillin v. People*, 8 Mich. 366; *Wellar v. People*, 30 Id. 22; *Patterson v. Garlock*, 39 Id. 449.

It was not error to permit the plaintiff to cross-examine the defendant fully in regard to his former relations with the plaintiff.

Defendant complains that the court refused to allow him to ask the prosecuting attorney the following question:

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"I will ask you, on the facts as told to you before the complaint was made or directed, whether you was satisfied in your mind that there were good grounds for ordering the complaint to be made."

This question was not proper. The defense could not be made out by proof that the prosecuting attorney acted in good faith in authorizing the prosecution. It must depend upon the defendant's good faith, and the testimony offered did not tend to prove that.

The court charged the jury, at the request of the plaintiff, as follows:

"This action is founded upon certain occurrences taking place at or about the time alleged in plaintiff's declaration. Those occurrences have been detailed to you on the one hand by Peterson, the plaintiff, and on the other hand by defendant, Toner, Henry Valley, produced by the defendant, and also, so far as she saw them, by Mrs. Valley. The right of plaintiff to recover here depends upon which of the two versions of that transaction is the true one, viz., that told by plaintiff, Peterson, or that told by defendant, Toner, and his witnesses."

Upon this the tenth and eleventh assignments of error are based. Counsel for defendant concede that this would have been correct if confined to the count for assault and battery, but say it was not so confined, and that the jury were by this instructed that they might bring in a verdict on both counts. We do not so understand the request. It refers expressly to the occurrences detailed to them by Peterson, Toner, Henry Valley, and by Mrs. Valley. Those were the occurrences connected with the assault and battery. Neither Valley nor Mrs. Valley testified to anything concerning the malicious prosecution, and the jury had no right to understand the court to be referring to the plaintiff's story about his arrest and prosecution.

The 12th, 13th, 19th, 20th, and 26th assignments of error relate to the charge of the court and the refusal to

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charge upon the subject of the defendant's justification upon the charge of malicious prosecution by the advice of the prosecuting attorney. Upon this point counsel requested the court to charge the jury as follows:

"If you find that defendant fully and fairly disclosed to the prosecuting attorney all the matters within his knowledge which he was bound as a man of ordinary intelligence to suppose would tend to cause or exclude a belief of the plaintiff's guilt of the offense of assault with which he was charged, then your verdict on the charge of malicious prosecution must be in favor of the defendant."

This the court declined to do, but charged the jury as follows:

"Now, as opposed to what the plaintiff is required to show upon that branch of the case, it is claimed that the defendant here went to the prosecuting attorney, and stated the case to him, and acted upon his counsel and advice. If you are satisfied, from any evidence in the case, that he did, and that he stated fairly all the material facts in the case, and did so honestly and in good faith, and that the prosecuting attorney advised him to commence this prosecution, and he acted under his advice, that would be a defense."

It is urged that this instruction made it necessary for the defendant, who was unlearned in the law, to decide, at his peril, what facts it was material for him to disclose to the prosecuting attorney; whereas, the law only required him to disclose such facts as a man of ordinary intelligence was bound to know were material. As an abstract proposition, this has considerable weight. But, as applied to this case, it has no force. The defendant was a party to the occurrence of November 18, 1888. He knew every fact connected with it. There was no chance for him to be mistaken about the facts, nor as to which of them were material. He has told his story in this case, which, we must presume, was the same story told the prosecuting attorney. If the plaintiff told the

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truth about what occurred between these parties, the defendant's story was false, and what he told the prosecuting attorney was false. He had not only come out at the plaintiff in a threatening manner with an axe, but when the plaintiff tried to escape from him by running across the field to the highway he followed. The defendant testified on this point as follows:

"I hollered to him three times to go back and shut the gate before I picked up the axe. The axe was just outside the gate. I picked the axe up just outside the small gate. The time I told him the third time, I was outside the gate. I had the axe. I had left it there where I had it splitting wood with it. I was not starting towards him. I was starting south,—kittering across the field to head him off. I had told him the third time to go back and shut the gate before I got to the small gate. I picked up the axe after that, just as soon as I got out of the gate. He didn't start to cross the field until he shot at me. He had not started before I got out of the gate. I was outside of the gate. When he saw me pick the axe up he shot at me. I didn't go down the road at all, but started across the field. I didn't run. I walked pretty quick. I am getting pretty stiff now. I heard Valley testify that I run. He might call it running; I didn't. I went as fast as I could to turn him back. I was bound to make him shut the gate. I wanted the axe for my protection."

The jury must have found that the plaintiff's story, corroborated, as it was, to some extent by the defendant, was true. If it was true, then there was no probable cause for the prosecution which defendant commenced against the plaintiff, and the story he told the prosecuting attorney was willfully false, and the advice based upon it was no defense.

Complaint is made that the court did not charge the jury as to the meaning of "probable cause," and as to the application of the law to the facts on that point. It does not appear that defendant's counsel requested any charge on this subject, nor that the attention of the

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court was in any manner called to this neglect, if it was neglect. The omission of a trial judge to charge the jury upon a point to which his attention is not called cannot, in a civil case, be assigned as error. *Rankin v. West*, 25 Mich. 195. No exception was taken to this omission of the circuit judge. The statute of 1885 (Laws of 1885, p. 104) does not cover an omission or refusal to charge.

Complaint is made that the court refused to give the defendant's thirteenth request, as follows:

"Even if the defendant did commit an assault on the plaintiff after the latter discharged his revolver, that fact could not affect the plaintiff's guilt on the charge of assault or defendant's right or justification in making the complaint, nor can it be considered by you in arriving at your verdict on the claim of malicious prosecution."

The court carefully discriminated in his charge between the defendant's guilt under the count for assault and battery and the count for malicious prosecution. The jury were charged as to what they must find in order to justify them in finding a verdict for assault and battery. The trial judge concluded what he had to say on that subject by the statement:

"Now, that is one part of the case. The other is for malicious prosecution."

Then followed a statement of the law applicable to that branch of the case. We think the jury were made to understand that, in determining whether defendant had probable cause for making the complaint, they could not consider what took place after the plaintiff fired his revolver. The refusal to give this specific request, was, under these circumstances, not error.

The last point relied on relates to the question of damages. It is said that the plaintiff gave no testimony from which the jury could estimate his damages. The plaintiff testified that the defendant assaulted him with an axe,

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and broke his wrist. For this the jury gave him $100. He testified that he lay in jail 10 days under the defendant's charge, which the jury finds was malicious. For this the jury awarded him $70. Large as these amounts are, we do not think the jury acted entirely without evidence in arriving at the result.

The judgment must be affirmed, with costs.

The other Justices concurred.

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THOMAS L. HECOCK v. CHARLES VAN DUSEN ET AL.

Trespass—Possession of plaintiff—Title—Tax deed—Supervisor's certificate—Evidence.

1. In trespass to lands, where the defense of title is interposed, the plaintiff must either show possession or paramount title in himself.

2. Paying taxes upon wild and uninclosed land, and occasionally looking it over, and requesting neighboring residents to report if it was trespassed upon, will not give the party asserting such acts of ownership such a *possession* as will entitle him to maintain an action of trespass.

3. A defendant in a trespass suit who entered into possession under a tax deed, and cleared up and fenced a small portion of the land, and planted a crop, and was in actual possession, claiming under said deed, is in a position to contest the plaintiff's title, the deed, though conceded to be void, giving him color of title to the whole premises; citing *Hoffman v. Harrington*, 28 Mich. 92.

4. The tax roll returned to the county treasurer is not admissible in evidence to show that the supervisor's certificate of assessment is defective, such certificate being no part of such tax roll, and not required to be copied therein; citing *Boyce v. Sebring*, 66 Mich. 215, 216.

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Error to Monroe. (Kinne, J.) Argued April 18, 1890. Decided April 25, 1890.

Trespass. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Randall & Corbin, for appellant.

John O. Zabel and *G. Morris*, for defendants.

[The points of counsel are stated in the opinion.—REPORTER.]

LONG, J. This suit was commenced in justice's court. Plaintiff declared against defendants in trespass for cutting timber upon the land, claimed to be owned by plaintiff in fee-simple, situate in the township of Summerfield, in Monroe county, and described as the "west half of the north-east quarter of section one." The defendants jointly pleaded the general issue, and gave notice, under the statute, that the title to land would come in question, also that the premises described in said declaration were not the close of the said plaintiff, but were the close and premises of Laurayn E. DeWolf and Charles H. DeWolf, under whose authority the said defendants entered and did the acts complained of. Defendants thereupon filed a bond as required by the statute, and the justice certified the cause to the circuit court of Monroe county.

The cause was brought to trial before the court without a jury, and the plaintiff, to maintain and prove the issue on his part, offered in evidence nine several deeds from the Auditor General of the State, purporting to convey the above-described premises to the plaintiff on account of taxes delinquent thereon for the years 1871, 1873, 1874, 1875, 1876, 1877, 1878, 1879, and 1880, for which taxes the lands were sold to the plaintiff; which deeds were admitted in evidence, subject to various objections

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of defendants to their validity. On the hearing the court found the following irregularities in the proceedings to assess, levy, and collect the taxes upon the land in controversy for the several years for which the deeds were given:

1. That the certificates of the supervisor attached to the several assessment rolls for said years do not comply with the requirements of the statute.

2. That for several of said years a larger amount of tax was assessed for township purposes than was authorized to be assessed, as follows:

a—For the year 1871 the said certificate, both as to the real and personal estate, was "that I have estimated the same at what I believe to be the true *taxable* cash value thereof," instead of the true cash value thereof; also, there was an excess of taxes assessed for highway purposes and bridges for that year of $400, which was unauthorized.

b—For 1873 the form of the certificate was the same as the year 1871, and there was also an unauthorized assessment for highways and bridges of $300.

c—For 1874 the certificate was in the same form as the former years noted, with the additional statement that the real estate is not estimated for what it would sell for "at *private* or auction sale," instead of "*forced* or auction sale," and there was also an unauthorized excess of assessment for highways and bridges of $300.

d—For 1875, no certificate of the supervisor is attached to the assessment roll; and there is also an unauthorized assessment for township contingent expenses of $100, and for highways and bridges of $33.

e—For the years 1876 and 1877 the supervisor's certificate attached to each assessment roll certifies, as to the real estate, that "I estimated the same at what I believe to be the value thereof," instead of "the true cash value thereof." The words "and not at the price it would sell for at forced or auction sale" are entirely omitted. As to the personal property, the same certificate states that "I have estimated the same at its true value, in accordance with the *usual way* of assessing property in this county."

f—For the year 1878 the certificate states, as to the realty, that it is estimated "at what I believe to be the true cash value thereof as *usually* assessed." As to the personal, he certifies, "I have estimated the same at the true cash value, as aforesaid, according to my best information;" the words "and belief" being omitted

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after "information," leaving "as aforesaid" to refer to "as usually assessed." Also, there was an unauthorized assessment for highways of $446.75.

g—For the year 1879 there is no certificate of the supervisor attached to the assessment roll; also, there is an unauthorized assessment for highways and bridges of $757.50.

h—For the year 1880 the supervisor's certificate attached to the assessment roll does not contain the words "and not at the price it would sell for at forced or auction sale," nor does it contain the words "and belief" after "information," at the end of the certificate; also, there is an excess of assessment, unauthorized, for highways and bridges, of $550.

The court further found that plaintiff had paid the taxes assessed upon the land in controversy for the years 1881, 1882, 1883, 1884, and 1886; that the plaintiff had occasionally looked over the lands, and at two different times, some years since, had requested two neighboring residents to look after trespassers on said lands, and inform him if trespasses were committed; that plaintiff had never fenced, inclosed, occupied, or cut timber upon any part of said land; that said land is wild and unimproved, except what improvements were made by defendants.

The court further finds that the defendants offered in evidence a deed dated December 20, 1886, executed by the county treasurer of Monroe county to Laurayn E. DeWolf and Charles H. DeWolf, the real defendants herein, purporting to convey to them the land in controversy for delinquent drain taxes assessed thereon in the year 1882; that after receiving said deed the said Laurayne E. and Charles H. DeWolf cleared off a piece of said land, containing from one-quarter to one-half an acre, plowed the same, sowed it to turnips, and constructed a brush and pole fence around it, except for about six rods at one end; that they paid all taxes assessed thereon for the year 1887; that they claimed to have purchased said land in good faith, but admitted on

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the trial that their deed was insufficient to convey title, but claimed sufficient color of title to show the extent of their claim of possession.

The court found, as matter of law,—

1. That no one of the nine tax deeds introduced by plaintiff is valid.
2. That the plaintiff has failed to establish any such possession as is contemplated by the statute.

Judgment was entered in favor of defendants upon these findings. Plaintiff brings error.

In this Court, it is contended by plaintiff's counsel that the court erred—

"1. In allowing the defendants to introduce any evidence attacking the validity of plaintiff's tax deeds.
"2. In allowing any evidence attacking plaintiff's tax deeds for the years 1871, 1873, 1876, and 1879, and especially in allowing the introduction of the tax rolls and copies of the supervisors' certificates for said years, found in the county treasurer's office, the originals not being produced or accounted for, or their contents proved.
"3. In finding the supervisor's certificates for the years 1871, 1873, 1876, and 1879, insufficient, and not according to the requirements of the statute.
"4. In finding that there was any excess of taxes for any of said years.
"5. In not certifying that the title to said land did not come in question after defendants admitted on the trial that they did not have title, and did not offer to show title in any third person.
"6. In not finding that the plaintiff had possession of said lands sufficient to enable him to bring trespass, and to quiet title in him."

The bill of exceptions contains the evidence taken on the trial. The defendants having pleaded title, plaintiff could only maintain his action in one of two modes: He must either show possession or paramount title in himself. The court found the fact, and there was some evidence to support this finding, that plaintiff was not in possession at the time of the commencement of the action; and

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it is apparent, from the testimony given, that he never had such possession as would entitle him to maintain the action of trespass from possession alone. Counsel contend, however, that defendants, after having pleaded title, abandoned that theory of defense on the trial; and, having admitted the invalidity of the county treasurer's deed, they were not in a position to contest the plaintiff's claim of title, and therefore they could not show the invalidity of the tax deeds under which the plaintiff claimed. It will be seen, however, that the defendants went into possession under the county treasurer's deed, cleared up a small part of the premises, planted a crop thereon, and were in actual possession of that part. Although it was admitted that the deed under which they claim was void, yet it gave them color of title to the whole of the premises described in the deed; they being in actual occupancy of a part. *Hoffman v. Harrington*, 28 Mich. 92. Defendants were, therefore, in a position where they might contest the title with plaintiff; and the plaintiff, to sustain his action, must prove his title to the premises.

Prima facie, his tax deeds showed the title in him, but the defendants had the right to contest their validity. The court, upon the evidence offered, found them invalid. If this is so, the plaintiff could not recover. It is not claimed here that the certificates to the rolls for the years 1874, 1875, 1877, 1878, and 1880 are in compliance with the statute; and it is not strenuously insisted that the deeds for those years can be upheld. But counsel contend that the only showing made as to the certificates of the supervisors to the rolls for the years 1871, 1873, 1876, and 1879 was from an introduction of the tax rolls from the county treasurer's office, and not the assessment rolls from the office of the supervisor. There can be no doubt that, under the ruling of this Court in *Boyce v.*

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Sebring, 66 Mich. 216, and cases there cited, defendants could not prove defective certificates from these tax rolls. It was there held that the certificate is no part of the roll, and need not be copied into the tax roll delivered to the collector. But this question does not become important except for the year 1876, from the view we take of the unauthorized assessment in the township, for those years, for highway and bridge funds.

The evidence supports the finding of the lower court that there was such unauthorized excess of moneys assessed for the years 1871, 1873, and 1879. Some claim is made that this excess might possibly have been made up from some action taken by the board of supervisors of the county in relation to taxes for highways and bridges, and that they may have authorized that excess, or that it might have been from the highway labor assessed and returned by the overseer, and levied by the supervisor; that, the presumption being, under the statute, that the whole amount is legally assessed, it was the duty of the defendant to produce the records of the action of the highway commissioner in assessing the highway labor tax for those years, and the reports of the overseers showing the amount paid; also what action, if any, was taken by the board of supervisors.

The statute then in force (chapter 10, Comp. Laws of 1871), by section 11, subd. 15, empowered the board of supervisors—

"To authorize any township or townships, in their respective counties, by a vote of the electors of said township or townships, to borrow or raise by tax upon such township any sum of money, not exceeding one thousand dollars in any township in any one year, to build or repair any roads or bridges," etc.

It is also provided by chapter 25, § 15, Comp. Laws of 1871, that—

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"Every overseer of highways shall, between the first and fifteenth days of November in each year, when required by a commissioner of highways, make out and deliver to such commissioner a list of all the lands of non-residents and of persons unknown which are taxed upon his list, on which the labor assessed has not been paid, and the amount of labor unpaid," etc.

Section 16 provides that—

"The supervisor of each township shall cause the amount of such arrearages of labor, estimating the same at one dollar for each day, to be levied on the lands so returned, and to be collected in the same manner that the contingent charges of the township are collected; and the same, when collected, shall be paid into the township treasury, to be applied by the commissioners of highways in the construction and improvement of roads," etc.

It appears, however, that for the years 1871, 1873, and 1879 the supervisor assessed these several items of non-resident highway tax, and that the same were charged to the township treasurer upon the books of the township clerk. This is evidence of the fact that this non-resident highway tax did not make up any part of the excess found by the report. We think the records put in evidence show quite conclusively that no part of this excess is made up of an amount authorized to be voted by the board of supervisors, under the provisions of the statute above quoted, and the court properly held the deeds void for those years by reason of such excess.

This does not, however, apply to the tax deed for the taxes delinquent for the year 1876. No excess is shown for that year, but the court set aside the deed exclusively upon the defective certificate of the supervisor. This was made to appear by the tax roll found in the office of the county treasurer. This was incompetent for that purpose, and the facts do not support the finding of the court below.

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For this reason the judgment of the court below must be set aside, with costs, and a new trial ordered.

The other Justices concurred.

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FRANCIS KING v. FRANCIS S. BATES, IMPLEADED WITH PETER J. COPPENS.

Justices of the peace—Service of process—Jurisdiction—Evidence.

1. A justice's judgment was sued over in the circuit court. Upon offering in evidence the docket entries and files, it appeared that the summons was served by a private person. No indorsement authorizing such service was upon the summons, nor did the docket show that any inquiry had been made by the justice as to the competency of the appointee. The circuit court permitted the justice of the peace who rendered the judgment to supply these omissions by his oral testimony, and to make the necessary indorsement upon the docket. And it is held that such action cannot be defended upon authority or reason.

2. The following general propositions are summarized from the opinion of Mr. Justice GRANT:

   a—Proof of service of process to give the court jurisdiction cannot rest in parol.

   b—Courts have liberally construed the statute of amendments in matters of form, where it is clear that no injustice can be done; but amendments without which the court obtains no jurisdiction to try the case can only be made by the trial court, and upon notice to the opposite party, who is entitled to make a showing.

   c—Justices' courts are courts of limited jurisdiction, having no stated terms; and when a case has been tried, and the record thereof entered upon the justice's docket, his control over it has ended, except to issue execution.

   d—A justice of the peace cannot supply a jurisdictional fact in his return to a writ of *certiorari* by certifying to its existence, and thus cure the error; citing *Noyes v. Hillier*, 65 Mich. 686.

   e—This Court has held that, after a justice of the peace has

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made his return as an examining magistrate, he cannot procure the signatures of the witnesses who had failed to sign their depositions; citing *People v. Chapman*, 62 Mich. 280.

f—A justice of the peace has no power to amend his judgment record by changing the Christian name of the defendant, although consented to by both parties; citing *Foster v. Alden*, 21 Mich. 507.

Error to Kent. (Burch, J.) Submitted on briefs April 18, 1890. Decided April 25, 1890.

Assumpsit. Defendant Bates brings error. Reversed. The facts are stated in the opinion.

FitzGerald & Barry (*F. A. Stace*, of counsel), for appellant.

John M. Mathewson, for plaintiff.

[The points of counsel are stated in the opinion.—REPORTER.]

GRANT, J. This suit was commenced by summons, March 14, 1889, before Milton M. Perry, a justice of the peace. Upon the return-day, defendant Bates, who had been personally served with process, appeared. Coppens did not appear, not having been served. Plaintiff declared on the common counts in *assumpsit*, and on a judgment rendered by Milton M. Perry, a justice of the peace, March 16, 1883. Defendant Bates demanded a bill of particulars. Plaintiff stated that this judgment was his bill of particulars.

Upon the trial the plaintiff offered in evidence the docket entry of a judgment rendered March 16, 1883, in favor of plaintiff, King, and against the defendants, Bates and Coppens. Defendants objected to its admission on the ground that the justice obtained no jurisdiction to render the judgment, because the summons was not served by any constable or officer of the law, and there

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was no proof in the record that it was served by any competent person, in accordance with How. Stat. § 6827. The justice overruled the objection, on the ground that the judgment could not be attacked collaterally. Neither Bates nor Coppens appeared in the *first* suit. Defendant Bates thereupon appealed *this* suit to the circuit court.

Upon the trial in the circuit the docket entry of the justice and the files in the case tried in 1883 were offered in evidence. The summons was not served by an officer. The justice placed the summons in the hands of a private person for service, but did not indorse any written authority to such person upon the summons; nor did his docket contain any statement that he had made any inquiry to determine the competency of the person so designated to make the service. The person so designated returned under oath that he had personally served the summons upon Bates. The learned circuit judge permitted Milton M. Perry, the justice, to testify that he did make inquiry into the competency of the person designated to make the service, and that he was a competent person; and also permitted said justice to take the summons issued in said cause, and to indorse upon it the following:

"On request of within plaintiff, and deeming it expedient so to do, I did, on March 8, 1883, appoint and empower Henry W. Booth to execute the within process, he being a competent and proper person to execute the same, being of lawful age, and not a party to the suit, and nowise interested in the event thereof. The above is indorsed hereon, the 11th day of January, 1890, by permission of the circuit court of the county of Kent, and in open court, by way of amendment.

"Dated January 11, 1890. MILTON M. PERRY,
"Justice of the Peace."

The court also permitted the justice to amend his docket by adding to it a similar statement to the above.

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This Court has too often decided that under a record such as this, before the amendments were made, justices of the peace obtain no jurisdiction, and that their judgments are null and void, to render any discussion or citation of authorities necessary.[1]

It is equally well settled that proof of service of process to give the courts jurisdiction cannot rest in parol. Courts have liberally construed the statute of amendments in matters of form, where it is clear that no injustice can be done; but amendments without which the court obtains no jurisdiction to try the case can only be made by the court which tried the cause, and upon notice to the opposite party. Upon such proposed amendments the opposite party is entitled to make a showing.

The amendment made by the justice in this case, by order of the court, cannot be defended upon authority or reason. When the case at bar was tried before the justice, plaintiff did not ask to amend, although the case was being tried before the same justice who tried the first suit. Justices' courts are courts of limited jurisdiction. They have no stated terms. When the case has been tried, and the record thereof entered upon the justice's docket, his control over it has ended, except to issue execution. In a case similar to this, the justice sought to correct the error in his return to a writ of *certiorari* by certifying the existence of jurisdictional facts; but this Court held that this did not cure the error. *Noyes v. Hillier*, 65 Mich. 636. This Court also held that after the justice had made his return in a criminal case he could not procure the signatures of the witnesses who had failed to sign their depositions. *People v. Chapman*, 62 Mich. 280. Nor can a justice amend his record after judgment by changing the Christian name of one of the parties, although both parties con-

[1] See *Gadsby v. Stimer*, 79 Mich. 260.

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sented. *Foster v. Alden*, 21 Mich. 507. See, also, *People v. Common Pleas*, 18 Wend. 558; *Ramsey v. Cole*, 10 S. E. Rep. 598.

The judgment of the court below is reversed, with costs, and a new trial ordered.

The other Justices concurred.

SAMUEL LYON v. WILLIAM C. DENISON ET AL.

Corporations—Stock—Execution.

"Stock issued by an association organized under How. Stat. chapter 188, for "yachting, hunting, fishing, boating, rowing, and other lawful sporting purposes," is *not* subject to levy and sale on execution under How. Stat. § 7697, authorizing the sale on execution of the share or interest of a stockholder in any bank, insurance company, or any other *joint-stock company*, incorporated under the laws of this State.

Appeal from Kent. (Burch, J.) Argued April 11, 1890. Decided May 2, 1890.

Bill to declare the transfer of stock in an association organized under How. Stat. chapter 188, for yachting and hunting purposes, void, and to direct the association to issue a certificate for said stock to complainant, who purchased the same at execution sale, etc. Complainant appeals from decree dismissing his bill. Decree affirmed. The facts are stated in the opinion.

Reuben Hatch, for complainant, contended:

1. How. Stat. § 7697, subjects the interest of a stockholder in any joint-stock company, incorporated under or authorized to be created by any law of this State, to seizure on execution, and

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the members of the Pottawatomie Club are such stockholders. The provisions of this section are broad enough to cover any corporation in which the interest of the corporators is represented by stock. The words "joint-stock company," as used in this section, are synonymous with the word "corporation;" citing *Blair v. Compton*, 33 Mich. 414.

Norris & Norris and *Fletcher & Wanty*, for defendants, contended:

1. At common law corporate stocks were not seizable on execution; citing *Blair v. Compton*, 33 Mich. 423; *Van Norman v. Circuit Judge*, 45 Id. 208; and complainant's right to levy on this stock depends wholly on How. Stat. § 7697.
2. How. Stat. chapter 188, under which defendant is organized, makes no provision for capital stock, so that if there be any it exists by virtue of the agreement of the members and the by-laws of the club. The certificate of stock issued provides that its ownership shall not entitle the holder to the privileges of club membership, unless duly elected a member. It necessarily follows that this club is not a "joint stock company," but rather a social organization, and, being such, its stock cannot be seized on execution. The remedy is statutory, and not to be enlarged by construction; citing *Van Norman v. Circuit Judge*, 45 Mich. 211.

LONG, J. The bill in this cause states, substantially:

"1. That on July 17, 1889, the complainant recovered judgment before Thomas Walsh, Esq., one of the justices of the peace of the city of Grand Rapids, against William C. Denison, in an action of *assumpsit*, for $127.34 damages, and $3 costs of suit; that, upon showing made on oath of complainant to the satisfaction of said justice, execution was ordered to be issued forthwith on said judgment, which execution was so issued by said justice on July 17, 1889, directed to any constable of said county, and was in the usual form; and that on July 19, 1889, the said constable levied said execution upon one share of the capital stock of the Pottawatomie Club, represented by certificate No. 9, issued to said William C. Denison.

"2. That the Pottawatomie Club aforesaid is, and was at the time of said levy, a corporation or joint-stock company, within the meaning of How. Stat. § 7697, existing under the laws of this State, and organized under and by virtue of chapter 188, How. Stat.

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"3. That said officer made said levy by leaving a copy of said execution, certified by him, with Charles F. Kusterer, then treasurer of said Pottawatomie Club.

"4. That said constable, having given due notice of the sale of said stock at public vendue, by notices signed by him, and put up on July 24, 1889, at three public places in the city of Grand Rapids aforesaid, where the said stock was levied upon, advertising the same for sale at public vendue to the highest bidder, at the outer front door of Court Block, so called, on Lyon street, in the city of Grand Rapids aforesaid, on July 31, 1889, at 2 o'clock in the afternoon, on said day, at the place aforesaid, offered said share of stock for sale at public vendue to the highest bidder, and that, said complainant being the highest bidder, the said stock was struck off and sold to him by said constable for the sum of one dollar, that being the highest sum bid therefor.

"5. That on August 6, 1889, a copy of said execution, and the return of said constable thereon, certified by said constable, was left with Charles F. Kusterer, treasurer of said Pottawatomie Club, and the officer whose duty it was to keep a record of the transfer of shares, by Reuben Hatch, attorney for said complainant, at the office of said treasurer, in the city of Grand Rapids aforesaid. Reuben Hatch, as attorney for said complainant, then and there demanded of said Charles F. Kusterer, for said complainant, a certificate of the share so bought by him at the said constable's sale; the said Reuben Hatch offering to pay the fees thereof, and for recording the transfer of said certificate to said complainant, which the said Charles F. Kusterer, as treasurer of said Pottawatomie Club, then and there refused.

"6. That on August 8, 1889, the said Reuben Hatch, as attorney for said complainant, left with Mark Norris, secretary of said Pottawatomie Club, another copy of said execution, and return thereon, certified by said constable, and demanded the certificate of said share of stock so bought by said complainant, at the same time offering to pay the fees therefor, and for recording the transfer, which the said Mark Norris, as secretary of the said club, refused.

"7. That the return of said constable indorsed upon said execution, a certified copy of which was indorsed upon the copies of said execution so left with said Charles F. Kusterer, treasurer of the said club, and with Mark

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Norris, secretary of the said club, was in words and figures following, to wit:

"'I do hereby certify and return that on July 31, A. D. 1889, at 2 o'clock P. M., I sold at the outer front door of "Court Block," so called, on Lyon street, in the city of Grand Rapids, Michigan, at public vendue, one share of the capital stock of the Pottawatomie Club, represented by certificate No. 9, issued to William C. Denison, the defendant within named, being the same stock levied upon by me by virtue of the within writ, to Samuel Lyon, plaintiff within named, for the sum of one dollar, that being the highest sum bid therefor, and he being the highest bidder; having given due public notice of said sale as required by law, by advertisement signed by me, and put up at three public places in the city of Grand Rapids aforesaid, where said stock was levied upon, on July 24, A. D. 1889.

"'J. C. PITKIN, Constable.'

"That the levy upon said stock was indorsed upon said original execution in words and figures following, to wit:

"'July 19, 1889

"'The within execution levied upon one share of the capital stock of the Pottawatomie Club, represented by certificate No. 9, the property of William C. Denison, the defendant within named.

"'J. C. PITKIN, Constable.'

"A certified copy of which was also indorsed upon said certified copies of said executions so served as aforesaid upon the said Charles F. Kusterer, treasurer, and Mark Norris, secretary, of the said Pottawatomie Club.

"8. That on the day following said levy said Charles F. Kusterer, as treasurer of said Pottawatomie Club, delivered to said constable a certificate in words and figures following, to wit:

"'I, Charles F. Kusterer, treasurer of the Pottawatomie Club, a corporation organized under and by virtue of chapter 188 of Howell's Statutes, and the officer of said club appointed to keep a record of the shares of the stockholders therein, do hereby certify that on July 19, 1889, at the hour of noon (at which time there was served on me a certified copy of an execution issued by Thomas Walsh, justice of the peace, in favor of Samuel Lyon, and against the goods and chattels of William C. Denison), said Denison appeared on the books of said club to be the holder and owner of one share of the stock of said club, and that a copy of the certificate of stock issued to said Denison is annexed hereto.

"'And I do further certify that on the same day, and prior to

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the service on me of said execution, one Lavello A. Denison notified me that said stock had been purchased by him, and said stock certificate assigned and delivered to him, on July 10, 1889.

"'CHARLES F. KUSTERER,

"'Treasurer of the Pottawatomie Club.

"'July 19, 1889.'

"COPY OF CERTIFICATE.

"'No. 9. 1 share.

"'The Pottawatomie Club of Grand Rapids, Michigan.

"'This certifies that William C. Denison is entitled to one share, of the par value of one hundred dollars each, of the capital stock of the Pottawatomie Club. This certificate may be transferred on the books of the treasurer of the club, who is transfer agent, to any person, on the surrender of this certificate, properly indorsed; but the ownership of said stock shall not entitle the person owning the same to any of the privileges of the club, unless such person be duly elected a member of said club. The club has a lien on this stock for all unpaid dues and assessments. One hundred dollars have been paid on each share of stock represented by this certificate.

"'*Grand Rapids, August* 17, 1887.

"'E. S. HOLMES, President.

"'N. FRED AVERY, Treasurer.'

"That at the time of said levy your orator had no knowledge of the pretended transfer of said stock to said Lavello A. Denison.

"9. That at the time of said levy the capital stock of said Pottawatomie Club was divided into shares, and certificates thereof had been previously issued to the members or stockholders of said club; that the stock so levied upon and sold was at the time of said levy owned by the said William C. Denison; that the said William C. Denison appeared to be the owner thereof on the books of the said club, and that no transfer of the same from said William C. Denison to any other person had been entered on the books of said club so as to show the names of the parties by and to whom the same was transferred, the number and designation of the shares, or the date of the transfer, nor in any other manner; that, as your orator is informed and believes, at the time of said levy the said Charles F. Kusterer, who was the transfer officer of said club, and kept a record of the stock and transfers thereof, had received no notice whatever from said William C. Denison, or from any other person, of any transfer of said stock from William C. Denison to the said Lavello

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A. Denison, neither had the said Mark Norris, as secretary of said club, received notice, at the time of said levy, of any transfer of said stock from said William C. Denison to Lavello A. Denison.

"10. That the said Lavello A. Denison is the son of the said William C. Denison, and was at the time of said levy, and of the pretended transfer of said stock from the said William C. Denison to the said Lavello A. Denison, mentioned in the certificate of Charles F. Kusterer hereinbefore set forth, in the employ of said William C. Denison; that, as your orator is informed and believes, no consideration was ever paid by the said Lavello A. Denison to the said William C. Denison for said stock; and that the pretended transfer of said stock from said William C. Denison to said Lavello A. Denison is fraudulent and void as to your orator, and was made for the purpose, and with the intent on the part of the said William C. Denison and Lavello A. Denison, of defrauding your orator, and defeating collection of said judgment in favor of your orator, and against said William C. Denison.

"11. That said pretended transfer of said stock by said William C. Denison to his said son is, as your orator is informed and believes, merely colorable, and made with a view of protecting the property and effects of the said William C. Denison, and said stock especially, and placing the same beyond the reach of your orator's said judgment, and enabling said William C. Denison to control and enjoy the same.

"12. That your orator is now, by virtue of said constable's sale, and his purchase of said stock thereat, the true and rightful owner of said stock, and entitled to a certificate thereof from the proper officer of the said Pottawatomie Club, and that he was, upon the service of certified copy of said execution, with the return of said constable indorsed thereon, upon Charles F. Kusterer, treasurer of said club, as aforesaid, entitled to a certificate of said stock, and that it was the duty of said treasurer, upon such service, and upon the offer of your orator's said attorney to pay the charges therefor, to have issued to your orator a certificate of said stock as such purchaser; that said stock is worth at least $200; that the attorney of Lavello A. Denison attended said sale, and warned all persons not to bid, and that is one reason why said stock brought so little.

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"13. But now, so it is, may it please this honorable court, that the said William C. Denison and Lavello A. A. Denison, combining and confederating together to and with divers other persons as yet unknown to your orator, but whose names when discovered your orator prays, may be inserted herein as defendants, and they made parties hereto, with proper and apt words to charge them, how to injure and oppress your orator, the said confederates respectively do refuse to allow to be issued to your orator a certificate of the share of the stock in said club so bought by him at said constable's sale, pretending that before the said levy upon said stock by said constable, under and by virtue of said execution, said William C. Denison assigned and transferred said stock to his said son, Lavello A. Denison, and that the said Lavello A. Denison, by virtue of said transfer and assignment, is a *bona fide* purchaser thereof; *whereas,* your orator expressly charges the truth to be that the said Lavello A. Denison, is not a *bona fide* purchaser of said stock, and that the said assignment and transfer is a mere sham and pretense, in order to cheat and defraud your orator out of the collection of said judgment,—all of which actings, doings, and pretenses of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator.

"In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this nature are properly cognizable and relievable," etc.

The bill calls for an answer, the answer on oath being waived, and prays that the pretended assignment and transfer of said stock by said William C. Denison to his said son may be declared void as a fraud upon the rights of the complainant, and that the same may be canceled, and the said club decreed and directed to issue a certificate of the share of stock to the complainant so bought by him at said sale upon his paying the fees therefor, and that William C. Denison and Lavello A. Denison may be enjoined and restrained from selling, assigning, transferring, delivering, negotiating, incumbering, or in

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any way or manner disposing of, said stock to any other person, etc. The bill also contains the usual prayer for other and further relief, and bill was duly verified.

The defendant William C. Denison filed a general demurrer to the bill. Defendant Lavello A. Denison appeared and filed his answer, containing a demurrer clause. By consent of parties the cause came on to be heard on the general demurrer of William C. Denison and the answer of Lavello A. Denison, setting up, among other things, that complainant's bill did not make or state such a case as entitled him to the relief prayed, and praying the benefit of a demurrer. The demurrers only were passed upon by the court, who dismissed the bill, with costs, on November 4, 1889. Complainant appeals.

Counsel for defendants, Denison, in this Court contended—

1. That the bill shows no jurisdiction in the justice to render the judgment or to issue the execution.
2. That the stock seized is not subject to levy, even had it not been transferred.
3. That it was equitable assets, and therefore not subject to levy.
4. That complainant ought to have filed his bill to settle the title to his stock before selling it under the execution.
5. That the bill fails to show that complainant's debt was in existence prior to the transfer of the stock, and hence shows no right to maintain this suit.

From the view we take of the case, however, it does not become necessary to discuss but one question, and that is, whether these shares of stock can be sold on execution.

The Pottawatomie Club was organized under chapter 188 of Howell's Statutes. Section 1 provides—

"That any ten or more persons of full age, at least six of whom shall be citizens of this State, who shall desire to associate themselves for yachting, hunting, fish-

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ing, boating, rowing, or other lawful sporting purposes, may make, sign, and acknowledge * * * and file in the office of the Secretary of State * * * a certificate in writing, in which shall be stated the name or title by which such association shall be known in law," etc.

Section 2 of the act provides that such association shall be a body politic and corporate, and in their corporate name—

"Shall, in law and equity, be capable of taking and receiving real and personal estate, either by purchase, gift, grant, lease, or bargain and sale, devise and bequest, not exceeding $25,000, in the aggregate, for the purpose of their corporation, but for no other purpose; and the same at pleasure grant, bargain, mortgage, sell, or lease for the use of said association; make all needful rules, regulations, and by-laws for the management of its affairs," etc.,—

And appoint officers and agents for the management of its business. The act also provides for succession by the election of officers and a board of directors for the management of its affairs. Section 7 of the act provides that said association shall possess the general powers conferred by, and be subject to the provisions and restrictions of, chapter 55, tit. 10, Rev. Stat. 1846 (How. Stat. chap. 191), so far as the same may be made applicable to associations formed under this act. Section 7, chap. 191, How. Stat., provides that whenever the capital stock of any such corporation is divided into shares, and certificates thereof are issued, such shares may be transferred by indorsement and delivery of the certificates thereof, such indorsement being by the signature of the proprietor or his attorney or legal representative; but such transfer shall not be valid, except between the parties thereto, until the same shall be so entered on the books of the corporation as to show the names of the parties by and

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to whom transferred, the number and designation of the shares, and the date of the transfer.

Section 7697 of Howell's Statutes provides that—

"Any share or interest of a stockholder in any bank, insurance company, or any other joint-stock company, that is or may be incorporated under the authority of or authorized to be created by any law of this State, may be taken in execution, and sold, in the following manner."

It is insisted that the Pottawatomie Club is not a joint-stock company within the meaning of section 7697, above quoted; that the act under which it was incorporated does not provide for the issuing of any certificates of shares of stock; and that the bill does not allege that the club has any property. It is evident that the Legislature, by section 7697, did not intend to limit the right of levy under execution to joint-stock companies as they were known at the common law, as it gives the right to levy upon the shares of stock in any bank, insurance company, or any other joint-stock company. Banks or insurance companies may be, and usually are, corporations, and yet the shares of stock issued by such corporations may be levied upon and sold under the provisions of this statute. A joint-stock company, at the common law, lies midway between a corporation and a copartnership. It is an association of persons for the purpose of business, having a capital stock divided into shares, and governed by articles of association, which prescribe its objects, organization, and procedure, and the rights and liabilities of its members, except that the article cannot release the members from their liability as partners to the creditors of the company. Cook, Stocks, § 504.

There is an essential difference between a joint-stock company as it existed at the common law, and a joint-stock company having extensive statutory powers, con-

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ferred upon it by the state within which it is organized. It is not within the contemplation of the statute under which the club was organized that it should carry on a business for profit, but to hold a limited amount of property for the purpose for which it was organized, to wit, "yachting, hunting, fishing, boating, rowing, or other lawful sporting purposes;" and it is quite evident the Legislature never intended that its shares of stock, if any were provided for by its articles of association or by-laws, should be regarded merely as property to be bartered and sold like shares of stock in a purely business concern, and to be treated subject to levy and sale under execution, within the provisions of section 7697. They are not, by the terms of the statute, compelled to issue stock in order to keep up and maintain their corporation. Their privileges and franchises are to be enjoyed by compliance with the statute under which they were organized. They have, however, issued certificates of shares of stock. Whether this is provided for in their articles or by-laws is not made to appear by the bill. From an inspection of this certificate it appears that the same may be transferred upon the books of the company by a surrender of the certificate properly indorsed, but it is also provided that the ownership of such stock shall not entitle the person owning the same to any of the privileges of the club, unless such person be duly elected a member of the club. That is, one holding and owning a share of stock has none of the rights and privileges of members of the club, of yachting, hunting, etc. Just what rights one holding such a certificate as owner might be entitled to, it is not necessary to determine upon this record. We are satisfied that the case does not come within the provisions of the statute authorizing the levy and sale of shares of stock of a bank, insurance company, or any other joint-stock company.

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The decree of the court below sustaining the demurrer must be affirmed, with costs.

The other Justices concurred.

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DANIEL A. CALDWELL ET AL. v. HERBERT BOWEN, TRUSTEE, ET AL.

Replevin—Jurisdiction—Costs—Sale—Fraud—Rescission—Declaration—Evidence—Commercial agencies—Reports.

1. A reporter for a commercial agency, having testified to procuring a statement of the financial standing of a merchant, which he reduced to writing, and a copy of which he had in his possession, was asked to refresh his recollection from the copy, and after stating that he could not remember the figures, but could state what the statement was by reading it, was permitted to read from the copy to the jury; and it is held that the testimony was incompetent, the effect being the same as if the copy had been introduced in evidence; citing *Fowler v. Hoffman*, 31 Mich. 215; *Cameron v. Blackman*, 39 Id. 103.[1]
2. A statement in a declaration in replevin, immediately following the description of the property, that it is an invoice of goods sold by the plaintiffs to the defendants' mortgagor, is mere description, and in no way affects the right of the plaintiffs to proceed as upon a rescission of the sale of the goods for the alleged fraud of the mortgagor in making the purchase.
3. Vendors, on rescinding a sale, brought replevin, and in the affidavit, writ, and declaration alleged the value of the goods to be $115.50, being the price agreed to be paid by the vendee. Goods appraised at $64.70 were seized on the writ, and the only evidence of the value of the goods not found was the aforesaid agreement. Judgment passed for the plaintiffs on the main issue, and it is held that they were entitled to costs under How. Stat. § 8964 (subd. 4), which gives a plaintiff in

[1] See *Mooney v. Davis*, 75 Mich. 188, where it is held that such a copy is admissible in connection with testimony tending to show the approval of the statement, as written down, by the merchant.

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replevin costs if the circuit court has exclusive or concurrent jurisdiction.

Error to Wayne. (Reilly, J.) Argued April 16, 1890. Decided May 2, 1890.

Replevin. Defendants bring error. Reversed. The facts are stated in the opinion.

George W. Radford, for appellants.

John W. Beaumont (*Floyd R. Mechem,* of counsel), for plaintiffs.

LONG, J. This action of replevin was tried in the Wayne circuit court before a jury, where the plaintiffs had judgment. Defendants bring error. Twelve errors are assigned.

It appeared upon the trial that the plaintiffs, who were copartners doing a mercantile business at Lynn, Mass., sent to F. T. Adams & Co., a quantity of ladies' shoes on or about October 29, 1887. The goods were sold on credit, and were claimed to be worth the sum of $115.50. The goods were ordered by Mr. E. T. Adams, by letter addressed to the plaintiffs at Lynn, Mass., dated June 1, 1887, and the order to be filled in the following October. It appears that the plaintiffs had, in the January previous, made inquiry as to the financial standing of Mr. Adams; and March 10, 1887, Edward Russell & Co., a mercantile agency, sent them, in answer, that E. T. A. (meaning E. T. Adams) states:

"Have no partner, but carry on business as above.[that is, as E. T. Adams & Co.] Have in stock about $18,000; outstanding accounts, $3,000; liabilities, $7,000, of which about $2,500 is to the bank, balance for merchandise. Have met all paper at maturity, but am behind probably 30 days with some of my bills; but owe no one firm over $500."

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Plaintiffs claim that it was in reliance alone upon this information obtained from this mercantile agency that they sent the goods to Mr. Adams. About November 14, plaintiffs received a circular letter from Mr. Adams that he was in financial embarrassment. Mr. Adams, in that circular letter, says:

"My financial embarrassment, which has been known to many of my creditors, if not all, for some time past, has at last become such that, being unable to see any hope or prospect of future success, I have secured as best I could those who have loaned me the capital with which I have done business, by giving chattel mortgages as follows: To Herbert Bowen, trustee, $3,000.00; Sarah F. Adams (my mother), $11,108.00; Laura S. Adams (my sister), $1,506.00."

Mr. Adams then gives in this letter his version or explanation of how his embarrassment occurred, and in which he states a large part of this indebtedness as accruing and outstanding prior to January 1, 1887. Immediately upon receipt of this circular letter, the plaintiffs telegraphed Mr. Beaumont, their attorney in Detroit, to rescind the sale to Adams & Co. upon the ground that the statements upon which they relied in making the sale were untrue, and to bring replevin for the goods.

The plaintiffs, to make their case on the trial in the court below, produced Mr. W. C. Pungs, who testified that he was reporter for R. G. Dun & Co., whose business is reporting the standing and credit of merchants throughout the city and other places; that there are several branches of R. G. Dun & Co.; that it is Dun, Wyman & Co. in Canada, and Russell & Co. in several states east; that on March 10, 1887, he visited Mr. E. T. Adams for the purpose of getting a statement of his financial condition, and had a copy of the statement with him. Witness was then asked, and permitted to answer, the following questions:

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"*Q.* Do you remember what the statement made by Mr. Adams was?

"*A.* I have a copy of it, and I will swear that he made it to me; and I remember distinctly going to his store and getting the statement.

"*Q.* Can you refer to the copy and refresh your recollection in such a way as to remember what the statement was? [This was objected to by defendants' counsel as incompetent and immaterial, and the objection overruled.]

"*A.* I can't remember the figures, but I remember going to the store.

"*Q.* By refreshing your recollection from the statement, can you say what the figures were, and what the result of the statement was? [This was objected to on the ground that the statement was not in court.]

"*By the Court.* If you have any paper or memorandum from which you can refresh your recollection as to what the statement was.

"*A.* In my hand I have a copy of it,—a copy of the statement made by him to me.

"*Q.* Refresh your recollection. Can you state what the statement was?

"*A.* Yes, by reading it; yes, sir.

"*Q.* What was his statement? [This was also objected to on the ground that it was incompetent and immaterial under the pleadings. The witness answered, and gave the same statement that has been heretofore set out as coming from Edward Russell & Co. to the plaintiffs, and upon which they claimed to have given the credit to Mr. Adams.]

"*Q.* What did you do with that statement?

"*A.* Put it on our records in the office.

"*By Defendants' Counsel.* That is read from a statement?

"*A.* No, sir; from a copy of the original."

Defendants' counsel then moved to strike out the testimony. This the court refused. The witness then testified that he made this statement in the shape of a report, and it went on the books of R. G. Dun & Co. and on the records; that he asked Adams for this statement of his financial standing, and Adams gave it, and

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knew the witness' business, and the purpose in asking for a statement of his affairs; that the commercial agency of Russell & Co. was of Boston, Mass., and that the statements made to R. G. Dun & Co. are furnished to Russell & Co., of Boston; but that he could not swear that this statement was transmitted to Russell & Co., as he did not do the mailing.

The contention of defendants' counsel here is that—

"It was evidence of a statement, the original of which was not in court, nor any evidence introduced that it had been lost; and the evidence of this statement is obtained from an alleged copy, without proof as to who made the copy, or as to its correctness, further than from Pungs' memory after reading the alleged copy in court two years after it was taken. Nor is there any evidence that the original statement, or a correct copy thereof, was ever furnished to Russell & Co., of Boston, and by them to plaintiffs. Under such circumstances, the original statement, if any was ever made, was the best evidence, and, in the absence of any proof that the original had been lost, the alleged copy was not admissible without proof of its correctness by the clerk or person who made it; and that there is no evidence who made the copy, or how many times it had been copied."

The witness, however, testified:

"I have a copy of it, and I will swear that he made it to me; and I remember distinctly going to his store and getting the statement."

It was to this copy that his attention was called, and from which he was asked to refresh his recollection. It did not matter whether it was a copy of the statement, or the one he took at the time he made the visit to Adams to get the information; he could use either to refresh his recollection. The only question is, did it refresh his recollection so that he could, with the aid of the paper, state what Adams told him? The original paper upon which he took down the statement made by Adams would not have been evidence, of itself, of the

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facts therein stated; and the witness had as good right to refresh his recollection from the copy as he would have had to refresh it from the original. Mr. Pungs says he could not remember the figures, but could remember that he went there and got the statement, and the paper he held was a copy of it. He was permitted to read from the copy held in his hand. As we have said, the copy could not be used in evidence; and it did not appear in the case that the witness, after having refreshed his recollection from the paper, was able to state what Mr. Adams told him, and from which he made his report to R. G. Dun & Co. The effect of receiving the evidence by reading from the paper was the same as though the paper was put in evidence. It was, therefore, but hearsay, and wholly incompetent. *Fowler v. Hoffman*, 31 Mich. 215; *Cameron v. Blackman*, 39 Id. 108; *Folsom v. Log-driving Co.*, 41 Wis. 607; *Com. v. Ford*, 130 Mass. 64; *Huff v. Bennett*, 6 N. Y. 337; *Howland v. Willetts*, 5 Sandf. 219; *Railroad Co. v. Adler*, 56 Ill. 344; *Mead v. McGraw*, 19 Ohio St. 55.

It is also contended that the plaintiffs were not entitled to introduce any evidence under the declaration, for the reason that the declaration alleged that the goods were sold to E. T. Adams & Co. The declaration is in the usual form in replevin; but, after describing the goods, it is alleged:

"Being an invoice of goods sold on or about June 1, 1887, by said plaintiffs to Edward T. Adams, who formerly did business under the firm name of Edward T. Adams & Co., of Detroit, Mich."

This is mere description, and in no way affected the right of the plaintiffs to proceed as upon a rescission of sale.

It is also claimed that the court should have directed judgment for the defendants for costs. The writ was

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directed to Mr. Bowen, as trustee, and Sarah F. Adams and Laura S. Adams. They had gone into possession under these chattel mortgages, and the officer executing the writ was unable to find all the goods described in the affidavit and writ. An inventory and appraisal was made of the goods actually replevied and turned over to the plaintiffs, from which it appears that the value of such part was only $64.70. The writ and affidavit alleged the value of the whole goods at the sum of $115.50. No evidence is given as to the value of the goods described in the writ and not found, except such as may be inferred from the fact that E. T. Adams & Co. had purchased the identical goods about a month previous, and had agreed to pay therefor the sum of $115.50. How. Stat. § 8964, provides that in the following cases, if the plaintiff recover judgment by default, upon confession, verdict, demurrer, or otherwise, in any action or proceeding at law, he shall recover his costs:

Subd. 4. "In all actions of replevin, and in all actions for the recovery of any debt or damages, or for the recovery of penalties or forfeitures, in all cases where the court has exclusive or concurrent jurisdiction."

The facts of this case take it out of the rule laid down in *Kittridge v. Miller*, 45 Mich. 478. The action was replevin for a fox-skin. Mr. Justice CAMPBELL said:

"This case, which involved only one dollar and a half, was brought in the circuit court, and not before a justice. While the former may have jurisdiction, it certainly ought not to have it, and probably was not intended to have it."

Chief Justice MARSTON said:

"I am also of opinion that the circuit court had no jurisdiction of the case, because of the amount involved therein."

It is said that the present case involved less than $100. This is not true. The affidavit, writ, and declaration all

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allege the value at $115.50; and the evidence tended to show the value of the whole goods at that amount. The plaintiffs, under the circumstances, had a right to rescind the sale and take their goods. The defendants had no greater rights in them than would E. T. Adams had the writ been brought against him. If the whole goods had been found, no question could have arisen about who was entitled to the costs of the suit, as the value was above $100. The circumstances were such as justified the court, under this statute, in awarding the costs to the plaintiffs.

For the error pointed out the judgment must be reversed, with costs, and new trial ordered.

CHAMPLIN, C. J., and MORSE, J., concurred with LONG, J.

GRANT, J. I agree with my brethren that the court erred in permitting the witness Pungs to read to the jury the copy of the statement made by Adams to himself. The copy was not admissible in evidence, because the loss of the original had not been shown. The witness had no recollection of the particulars of the statement, and could not testify to them except by reading what he took down at the time. If the witness had produced the original statement, and had sworn that he took down correctly, at the time, what Adams had told him, but that he could not remember it, and could only tell it by reading the statement, I think the statement would have been admissible. In such case, unless the statement can be admitted, or the witness allowed to read it, the testimony must be excluded, because the witness has no independent recollection of what was said.

If, at the time a statement is made, particularly where it involves figures, a person makes a memorandum of those figures, he would hardly be entitled to credence if he should swear that he recollected the figures independ-

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ently of the memorandum. The rule that he may examine the memorandum, and then must swear that he has a recollection of them independent of the memorandum, before he can testify to them, is not, in my judgment, founded upon reason or sound policy. To exclude the statement is to exclude the most reliable evidence, and results either in excluding the evidence altogether, or in placing it before the jury in such a way as to weaken, if not destroy, its value.

CAHILL, J., concurred with GRANT, J

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SARAH COLLINS v. THE TOLEDO, ANN ARBOR & NORTH MICHIGAN RAILWAY COMPANY.

Negligence—Railroad companies—Station—Means of ingress and egress—Evidence.

1. It is the duty of a railway company to provide a reasonably safe and convenient means of reaching its station, and if, with full knowledge of the facts, it permits an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as if it had itself set up and maintained the dangerous way; citing *Cross v. Railway Co.*, 69 Mich. 363.

   So *held*, where at a country station a platform used by passengers in entering and leaving the cars was so high as not to be conveniently reached, particularly by women, without a step, which the company failed to provide. A well-beaten path led from the store of the station agent to this platform, which path was commonly used by the public, and some one had provided a plank reaching from the platform to the path, which was commonly used in reaching the platform, and had been since the depot was built, and by the falling of which plank the plaintiff was injured.

2. In such a case evidence is admissible to show how long the plank had been in use, and the extent of its use by the public.

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Error to Shiawassee. (Newton, J.) Argued April 17, 1890. Decided May 2, 1890.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Lyon & Hackleman, for appellant, contended.

1. A railroad company may select and adhere to such arrangements of its depots and platforms as it sees fit, if they are safe and commodious. Passengers cannot be supposed to be ignorant of the necessity and use of platforms, and when one is in plain sight, which they must know was made for their use, they cannot complain that they are not accommodated; citing *Railroad Co. v. Coleman,* 28 Mich. 440; *Bedell v. Berkey,* 76 Id. 435; *Railroad Co. v. Zebe,* 37 Penn. St. 420; *Railway Co. v. Scates,* 90 Ill. 586.
2. In this case the fact was undisputed that a platform was provided by the company from the highway to the depot, of which no complaint could be made, except that the step was fifteen and one-half inches high, and this defect is not complained of in the declaration. It was not alleged or proved that the plaintiff, or any one, ever suffered, or ever took another and dangerous way, on account of it, and under the facts as proved, and law as announced, the plaintiff was guilty of carelessness in going the way she did.
3. While evidence of the customary way of doing a thing may sometimes be shown, custom cannot justify a negligent act, nor can proof of a custom be adduced to show negligence. Such evidence would be in effect excusing defendant's negligence, by showing a custom of others to be equally negligent; citing *Railroad Co. v. Coleman,* 28 Mich. 440; *Railway Co. v. Evansich,* 61 Tex. 3; *Railroad v. DeBray,* 71 Ga. 406; *Mason v. Railway Co.,* 27 Kan. 83.

Watson & Chapman, for plaintiff, contended for the doctrine stated in the opinion.

CAHILL, J. This action was brought to recover damages on account of an injury to plaintiff's foot occasioned by the falling of a plank on which she was walking in ascending the platform at defendant's depot at Carland.

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The plaintiff recovered $1,000, and the defendant brings error.

Carland is a station in the country at a crossing of an ordinary country road, without sidewalks. There are two stores on the opposite side of the highway, and a little south. At the time of the accident, Mr. Shannon, one of the store-keepers, acted as agent. The station and platform had been built for about three years prior to the accident, which occurred on August 21, 1888. The station-house was surrounded by a platform elevated in most places about two feet from the ground. From the platform which surrounded the depot there extended west, along the railway track, another platform, about 40 feet long and 12 feet wide, which was used by passengers entering and leaving the cars. At the west end of this platform, it was not so high above the ground; and at one point, at least, near the north-west corner, the ground was only about 15½ to 16 inches lower than the top of the platform. The railroad company had never provided any steps to this platform at any point, and persons having occasion to visit the station were required to step from the ground, a distance of 20 to 30 inches, varying with the level of the ground at different places, except that, if they entered it at the west end, they could reach it by stepping between 15 and 16 inches. The west end of the platform, however, was little used. Most of the people who went to the station would go there from the stores; and, in reaching the station from the stores, it was a shorter and more direct route to pass to the south of the platform extending west, and reach the platform at a point close to the station. There was a well-beaten path from the store of Mr. Shannon, the agent, running easterly towards the station to the edge of the platform which ran north and south close by the station. There was a plank about 12 inches wide and 14 feet long at the

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point where the beaten path reached the platform, which was commonly used by persons ascending the platform at that point, and had been ever since the depot was built.

On the day of the accident the plaintiff, with her husband, had gone to the station to receive the body of a grand-daughter which was expected to arrive on a train. Several of their neighbors were gathered with them at the store of Mr. Shannon, awaiting the arrival of the train. When they started to go to the station the entire party followed the beaten path which led from the store to the point where the plank was. All of the party, consisting of four or five persons, ascended the plank in safety; but, while the plaintiff was on it, it slipped and fell to the ground, carrying the plaintiff with it, severely injuring her foot, and, as she claims, permanently disabling her.

The declaration charges that it was the duty of the defendant to keep the depot and grounds in good repair for the protection and safety of its patrons, and to provide suitable steps to reach the platform connected with the depot; and it is alleged that the defendant negligently failed to build, erect, or maintain any approaches to said platform and depot, whereby the same became and was very dangerous to those coming upon defendant's grounds on business with defendant.

"And said plaintiff avers that the only means provided for her to reach said platform was by means of a plank laid upon said platform, one end resting thereon, and the other end resting on the ground, which said defendant had provided for and allowed its patrons to use in getting upon its said platform, and into its said depot; that said plank had been so used by the patrons of said defendant for a long space of time prior to said 21st day of August, 1888, with the knowledge and consent of said defendant; that said defendant carelessly and negligently left said plank, and permitted and allowed it to be used by its patrons, and those who came to its depot and platform

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on business with said defendant, and carelessly and negligently failed to fasten the same securely to said platform, so that the same would not fall and injure those who were using it in course of business with said corporation, whereby it became and was very dangerous to those using the same to reach said depot and platform."

The case against the defendant, plainly stated, is this: It was its duty to provide a reasonably safe and convenient means whereby persons having business at the station could reach it. The platform about the station was so high as not to be conveniently reached, particularly by women, without a step. The defendant provided no step. As a result, some one else, no matter who, provided a way—a temporary expedient—for getting over the difficulty. This temporary expedient was adopted by the public. It grew into a common way. The station agent used it. Everybody used it. There was a well-beaten path leading to it. If a person approaching the station looked along the platform, for a step upon which to ascend it, and saw none, there was the plank, with the beaten path, inviting him. Although the platform at the west end was lower, it was not enough lower to attract attention to it as the place especially intended or designated for people to enter it. When the plaintiff attempted to use the plank on the day of the accident, she did so only after her companions had preceded her in safety. It may have appeared safe. The declaration alleges that its insecurity lay in the fact that it was not fastened. The plaintiff testified:

"Just as I got almost ready to step my foot on the platform, this plank slipped back and went down; and I went with it, of course."

The court charged the jury:

"3. If the defendant habitually received and let off their passengers at such place by way of a plank, they must be expected to use such care as the circumstances

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called for; and if they did not use such care they would be guilty of negligence; and, if the plaintiff was injured thereby without any fault or negligence on her part, or want of due care on her part, she would be entitled to recover."

"5. If the jury find that the company did not provide the plank in question for the purpose of its being used by people going to and from the depot, but it was procured and used for the purposes and in the way stated by Mr. Shannon, the agent, then the company is not liable for the use of it by the plaintiff in the manner she did, on account of which she got hurt, unless you find that the company knew that said plank had for a long and continuous time been used by people doing business with said company, for the purposes of ingress and egress to and from the passenger depot of said company."

We think the court was justified by the evidence in these instructions. The duty of the railroad company to provide a safe means of reaching the station is clear. If, with full knowledge of the facts, it permitted an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as if it had itself set up and maintained the dangerous way. *Cross v. Railway Co.*, 69 Mich. 362 (37 N. W. Rep. 361); *Beard v. Railroad Co.*, 48 Vt. 101; *Railroad Co. v. Trautwein*, 19 Atl. Rep. 178; *Keefe v. Railroad Co.*, 142 Mass. 251.

Error is assigned upon the admission of evidence tending to show how long the plank had been in use, and how much it had been used by the public. We think such testimony was competent to show the extent to which the way had been used.

The judgment will be affirmed, with costs.

The other Justices concurred.

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CORNELIUS F. KNIGHT v. HENRY U. LINZEY, IMPLEADED WITH J. DAVISON.

Bills and notes—Bohemian oat note—Action by defrauded party—Knowledge of maker as to character of transaction—Public policy.

1. An innocent party, who is defrauded into giving his promissory notes, is not obliged, upon information received from the party who defrauded him, or upon any other information short of a certainty, to contest the validity of the notes in the hands of a purchaser who was a stranger to the original transaction, and who is presumably an innocent holder of the paper.
2. An instruction to the jury in a suit to recover money paid to an alleged innocent purchaser of Bohemian oat notes, on the ground of the fraud of the defendant in securing the notes, from which the jury may infer that the payor had a right to rely upon the statements of the defendant, independent of his own knowledge and belief, and that, not being equally in fault, he might recover back the money so paid, although he knew at the time he gave the notes that the whole scheme was a fraud, and that, if he won, it must be that some one else would lose by like transaction, out of which he must obtain his profit, is not good law.

Error to Shiawassee. (Newton, J.) Argued April 17, 1890. Decided May 2, 1890.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

Watson & Chapman, for appellant.

S. S. Miner and *A. L. Chandler,* for plaintiff.

MORSE, J. This is another Bohemian oat case, and comes here from the Shiawassee circuit court, where the plaintiff recovered judgment. The declaration is framed upon the same theory as those in *Hess v. Culver,* 77 Mich.

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598, and *Pearl v. Walter*, 80 Id. 317. The plea was the general issue. The same objection was made to the introduction of proof under the declaration as we have recently noticed in *Pearl v. Walter, supra*, and will need no further attention.

The principal points raised in the case relate to the charge of the court. It was alleged in the declaration that the plaintiff was induced to make two notes, one for $100 and one for $200, and that these notes were sold before due, by the defendant Linzey, to an innocent purchaser for value. It appeared upon the trial that the $200 note was sold before due to one Edward Rose, and the $100 note to one Silas Frye, and that the plaintiff had paid them to these parties before bringing suit. Linzey sold the note to Rose; and Davison, the note to Frye. Linzey testified that he told both Rose and Frye, before they purchased the notes, that they were given for Bohemian oats, and that he informed plaintiff of this fact before he paid the notes. Plaintiff, however, denies that Linzey told him anything of the kind; and Rose and Frye swear that they did not know the notes were given for Bohemian oats until after they purchased them. Reuben Johnson testified that he heard Linzey tell Rose that the note was given for Bohemian oats before Rose bought it; and two other witnesses swore that they heard Linzey tell plaintiff that, if he was in Knight's place, he would not be in a hurry about paying the notes, as Rose knew what they were given for before he purchased.

The counsel for the defendants insisted upon submitting to the jury the question whether or not Rose and Frye, or either of them, were innocent purchasers of the notes, and requested the court to instruct the jury that, if they found both of them not to be innocent purchasers, and plaintiff knew it, his payment of the notes to them was voluntary, and he could not recover, or, if either

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one of them was not an innocent purchaser, and plaintiff knew it, he could not recover for the note held by such one, and also submitted the following request, in addition:

"9. The notes in question in this suit were void, and the purchasers thereof are supposed to know for what they are given, and could not recover upon the notes of plaintiff until they first proved, by a preponderance of evidence, that they were innocent purchasers of the same; and it became the plaintiff's duty to make a fair and diligent inquiry into the facts, and ascertain whether they were innocent purchasers, before he paid the notes, and, if he paid them without making such inquiry, then he made the payment voluntarily, and cannot recover in this case; and, before he can recover, he must prove, by a preponderance of evidence, that said Rose and Frye were innocent purchasers of the notes."

The court gave these requests, but qualified the last or ninth by adding:

"Unless you find that he was fraudulently influenced to make and deliver the notes by Linzey, the defendant, or by Davison in the presence of Linzey."

Counsel also requested a charge as to each note, that, if they found the purchaser (Rose or Frye) not an innocent purchaser, and that he knew for what the note was given, then the plaintiff, if before payment he had been reliably informed of facts which showed that such purchaser was not a *bona fide* one for value, was not obliged to pay the same, and it became a voluntary payment, and he could not recover of Linzey the amount of such payment. This was given, with the following qualification:

"Unless the jury should find that there was fraud practiced on the plaintiff in obtaining the notes from him by defendant and Davison, and of which fraud plaintiff had no knowledge or information when he gave said notes."

These directions were, if anything, more favorable to the defendants than the law is. If the plaintiff, an inno-

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cent party, was defrauded into giving these notes, he was not obliged, upon information obtained from the party who had defrauded him, or any other information short of a certainty, to contest these notes in the hands of a stranger to the transaction of their inception, and who would be presumably an innocent holder of them. He was not compelled to take the chances of two lawsuits to obtain relief from, or redress for, the fraud committed upon him.

The court charged the jury, substantially as requested by the defendants, that if the plaintiff entered into the transaction, knowing that in the end some person or persons must be defrauded, and knew how the oats were bought and sold, then plaintiff and defendants were engaged in a transaction against public policy, and therefore void; and the law would leave each of them where they had left themselves, without redress, and the plaintiff could not recover if he knew of the common fraud. This charge was correct, but it is claimed that the circuit judge entirely neutralized the effect of it by stating subsequently in his charge as follows, it being the plaintiff's third request:

"Knight had a perfect right to rely upon the statements of Linzey, and was not bound to seek information elsewhere, and Linzey was bound to make true statements to Knight; and, if he made false statements to Knight which were material, and Knight relied upon such statements, and believed them, and parted with his two promissory notes, and afterwards paid said notes, and Knight was not equally in fault with Linzey, then Knight would be entitled to recover."

The court further said in his general charge, in reference to this subject:

"I charge you that if two men, of equal knowledge, enter into a contract, deliberately, for the purpose of doing an act which is fraudulent, and the tendency of which is to contravene the principles of the common law,

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or in violation of the statute, then each would be equally in fault; and, so long as the contract remains unperformed, neither party would be aided at law or in equity to its enforcement. The law would leave them where they had placed themselves. But if they were not equally in fault,—and this doctrine applies where the action is brought upon the contract,—if one of them was influenced by the judgment of the other, did not act upon his own knowledge of the facts, and was ignorant of the facts until he was informed by the other party of their existence, and relied upon the judgment of the other party, and upon his statements of the facts communicated to him by the other party, and believed them to be true, and then relied upon the judgment of that other person, he at the time believing and relying upon that other person as to the existence of the facts communicated to him, as to the honesty of the subject-matter of the contract entered into,—of its being lawful,—he would not in such case be a knowing and guilty participant in the violation of law, or in contravention of public policy.

"If the plaintiff in this case had no knowledge of the scheme of the Bohemian oat business,—had no knowledge or information of the corporate existence of the pretended company, or the want of integrity of its purpose, and the honesty of its business,—and relied entirely upon the defendant's statement, from his long acquaintance with him, and believed that the corporation was organized as stated, and believed that its business was an honest one. and his own judgment was insubordinated to that of the defendant and the man Davison, or either of them, he would not be equally to blame as those from whom he got his information, and on whose judgment he relied."

This part of the general charge was certainly good law, well and clearly expressed.

But following this the court referred to the legislative act of 1887 as being aimed, not at the man who made the note, but at the one who procured it and put it in circulation. He said that the act did not apply to or govern the case in hand, as the notes were made long before it passed, but that he referred to it as illustrating the views of the prominent men who composed the Legislature.

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"It makes a man a criminal who procures a note by falsehood, and puts it in circulation, but does not say anything about the man who gives the note."

He then closed his directions as follows:

"I therefore charge you that if you find that Linzey, in the presence of Davison, made the representations stated in the declaration,—whether he knew them to be false or not would make no difference,—and the plaintiff was influenced thereby, and relied upon them, and believed them to be true, and acted upon them, then he would not be equally at fault; and, if the plaintiff has been injured thereby, he will be entitled to recover the amount he actually paid, with interest at six per cent. from the time of payment to date. But if he had knowledge, and he acted upon his own knowledge and judgment, knew that the scheme was fraudulent, and made a contract for gain, and was equally guilty of contravening public policy, then your verdict should be for the defendant."

"The action is brought for the fraud which he alleges was practiced upon him, and not upon the contract that was made, and the contract is referred to for the sole purpose of proving the extent of the injury sustained, in case of fraud practiced. The plaintiff must prove fraud by a preponderance of evidence that satisfies you of that fact, and you must find that the plaintiff did not knowingly participate in it. A man cannot very well be said to participate in an unlawful act when his mind is a blank so far as the facts are concerned; and where the facts are stated by another, and impressed upon his mind, his act is built upon the declarations and information conveyed by that other, and of which he has no independent knowledge. The conduct and representations of the defendants Linzey and Davison may be considered by you in determining the relations of this party to the fraud, if one was committed; and you may consider, also, what took place soon after by these two men, in the absence of the plaintiff, in disposing of the notes."

It is very plain to me that the jury must have been misled by the instructions of the circuit judge, taken as a whole. The third request of the plaintiff, as given, is

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not sound law. It must be conceded that Knight was not equally in fault with the defendant Linzey, as Linzey was the moving party in the fraud, and by his persuasion and representations influenced Knight more or less in the transaction. But if Knight knew it was a fraud, and went into it solely for the purpose of making money out of it, knowing that, if he made any money, some innocent third party must be defrauded thereby, and that this was the natural outcome of the scheme, the law will not permit him to recover back from Linzey what he paid to him, as it would be money knowingly paid in furtherance of fraud; and a recovery, under such circumstances, would be against public policy.

"The benefits and burdens growing out of the illegal business cannot be distributed or equalized. The law will have nothing to do with the transaction in any way, except to declare it void." *Ward v. Doane*, 77 Mich. 335.[1]

Under this third request the jury may well have inferred that Knight had a right to rely upon the statements of Linzey, independent of his own knowledge and belief, and, being not equally in fault, might recover back the money paid upon the notes, although he knew at the time he gave them that the whole scheme was a fraud, and that, if he won, it must be that some one else would lose by a like transaction, out of which he must obtain his profit. This is not the law.

The latter part of the general change was also misleading. The court said:

"But if he had knowledge, and he acted upon his own knowledge and judgment, knew that the scheme was fraudulent, and made a contract for gain [and was equally guilty of contravening public policy], then your verdict should be for the defendant."

The insertion of the clause which I have inclosed in

[1] The word "distributed" reads "disturbed," as printed in 77 Mich. 335,—a palpable mistake.

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brackets made that bad law which would have been good law without it; for, if he knew the scheme was a fraud, and acted upon his own knowledge and judgment, he could not well have been deceived by the defendants, and whether or not he was equally guilty with them of contravening public policy became of no moment. In such a case the plaintiff would take his chances, as does one upon the throw of a dice-box.

Unless the jury was misled by the charge of the court, it would naturally seem, from the plaintiff's own testimony, that they must have found against him. He testified on cross-examination as follows:

"*Q.* You are a school-teacher, or was?

"*A.* I taught school a few terms.

"*Q.* Until you found you could make more money as a farmer than a teacher? Why did you go into the Bohemian oat business,—for what purpose? What was the object of it?

"*A.* I supposed I would make a little money out of it, according to their representation.

"*Q.* You went into the Bohemian oat business, knowing it was a fraud and a swindle, for the purpose of making money,—thought you could, the way it was represented to you?

"*A.* Yes, sir.

"*Q.* You didn't go into it for any other purpose than to make money?

"*A.* Not a bit; no, sir.

"*Q.* You understood it to be a fraudulent, but a money-making, scheme, by which you were going to have sold forty bushels of oats at fifteen dollars per bushel—did you not?

"*A.* Yes, sir.

"*Q.* And that was the inducement that led you to get into it, believing that you could make that much money out of it, though you knew it was a fraud?

"*A.* I thought I could make some money out of it.

"*Q.* I asked you if you knew it was a fraud, and that to make money was the inducement that led you to go into it?

"*A.* Yes, sir.

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"*Q.* You didn't expect the Bohemian oat business could run always, did you? You thought it would go down at some time?

"*A.* I didn't know it would.

"*Q.* I ask you, didn't you think that it would have to go down some time?

"*A.* I didn't know but it might.

"*Q.* Didn't you expect it was going down at some time?

"*A.* I didn't know whether it would or not.

"*Q.* Didn't you expect it was going down at some time?

"*A.* Yes, sir.

"*Q.* But you didn't expect it was going down before your bond was raised?

"*A.* I didn't know anything about that.

"*Q.* You didn't think it was going down before your bond was raised, did you?

"*A.* I didn't know that it would.

"*Q.* You didn't think it would?

"*A.* No, I did not.

"*Q.* But finally you thought some one would get caught just as you have been caught now?

"*A.* I didn't know they would.

"*Q.* I am not asking you what you knew, but if you thought that.

"*A.* Yes, sir.

"*Q.* At the time that you went into it?

"*A.* No, sir; I did not know that anybody was going to get caught.

"*Q.* I am not asking you what you knew about the scheme. Did you know how the business was done?

"*A.* Yes, sir.

"*Q.* I ask you now, and you have told me that you expected it was going down,—that thing could not run always. You expected it would go down,—that somebody would lose on it,—didn't you?

"*A.* Yes, sir.

"*Q.* You knew they must lose, didn't you?

"*A.* Yes, sir.

"*Q.* So you knew, if your contract was carried out, some one would, in the end, lose his money?

"*A.* Yes, sir.

"*Q.* And you thought you would make some out of it?

"*A.* Yes, sir; I thought I would make a little.

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"*Q.* You went into a speculation to make something for nothing, and got left, didn't you?

"*A.* Yes, sir; a three hundred dollar note."

It is suggested that many of these questions were double, and therefore misleading; that the answers might have referred to the first part of these double questions, and not to the whole; and that plaintiff did not understand the full import and meaning either of the questions, or the questions and answers taken as a whole. But the testimony above quoted was the last evidence he gave as to the reasons that actuated him in going into this transaction, and remains unexplained in the record. It may be that he was led into these statements by the skill and ingenuity of the attorney who cross-examined him; but, if so, his attorney did not, for some reason, attempt to get him out of the trap into which he had fallen, if trap it was. But, unexplained, the logic of this testimony was that Knight well knew what the scheme was,—that it was a fraud and a swindle for the purpose of making, and the inducement for going into it was to make, money fraudulently; and he also knew that, if his contract was carried out, somebody, in the end, must lose money by his gain. He went into this fraud "expecting to get something for nothing, and got left." What matter is it to the courts, under this testimony, whether or not Linzey made false representations to the plaintiff? Upon this evidence, unexplained, the plaintiff plainly barred himself from recovery.

While the Legislature has wisely shaped the law so as to punish criminally the men who are travelling about the country procuring notes like these, and as Linzey procured this one, there still is no redress for the plaintiff, under his own showing, against these defendants, until the Legislature shall see fit to provide him a remedy by statute. The unwritten law will give him no relief, and,

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in my opinion, very properly leaves him where he has put himself, because he went into it with full knowledge of what he was doing, and that the transaction was unlawful. His testimony does not show a case "where he was influenced by the judgment of the other," or that he—

"Did not act upon his own knowledge of the facts, and was ignorant of the facts until he was informed by the other party of their existence, and relied upon the judgment of the other party, and upon his statements of the facts communicated to him by the other party, and believed them to be true, and then relied upon the judgment of that other person, he at the time believing and relying upon that other person as to the existence of the facts communicated to him as to the *honesty of the subject-matter of the contract* entered into,"—

And believed it to be lawful. In view of his testimony above quoted, it cannot be said that the representations to plaintiff that the company was incorporated could have influenced him to believe the transaction lawful; for it is not to be presumed that, knowing what he says he did about the scheme, he would believe that such a fraud could be legalized by incorporation, or that such a swindle as the plaintiff admits he knew this to be would be permitted, much less made lawful, by the State.

This is a different case from that shadowed forth in the declaration in *Pearl v. Walter, ante,* 317, where the plaintiff was afraid there was "something wrong" in it at first, but had his fears overcome and his suspicions removed by the representations of those who seemed to know more than he did about the matter. Here the plaintiff says he knew it was a fraud, and that he could not gain unless some other person than defendants lost, and that, really, the only inducement that led him into it was his cupidity and greed. He was not actually deceived, and he was "consciously wrong." See *Hess v. Culver,* 77 Mich. 598. He knew what the fraud was, but

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thought he might get his money out of it, and the profit with it, before the scheme collapsed. He took the chances that the fraud might not be operated upon him, but upon some one else for his benefit.

The verdict should have been, as the record stands, for the defendants. It may be that on another trial the plaintiff may make a better showing as to his want of knowledge of the fraud, and his reasons for entering into it; but, as the case appears here, a new trial must be granted to the defendants, with costs of this Court, and the judgment of the lower court reversed.

The other Justices concurred.

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DAVID RUSSELL v. THE DETROIT MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Mutual insurance companies—Authority of agent—Estoppel—Damages—Charge to jury.

1. Whether How. Stat. § 4247, which limits insurance by mutual fire insurance companies to buildings that constitute detached risks in villages and cities, refers to *incorporated* or *platted* villages, is not decided, the Court not being *inclined* to so limit it; but the question is held unimportant where the application located the building in the "*town* of Sumpter, south side of Main street," and the word "village" was substituted in the policy, issued at the home office, such act estopping the company from denying that the *place described* is a village because neither platted nor incorporated as such.
2. It seems to be settled by the weight of authority that there is no distinction between mutual and stock fire insurance companies as to their responsibility for the acts of their agents in taking applications for insurance.
3. A policy-holder in a mutual fire insurance company does not become a member until he receives his policy; and if there is

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no limitation of the agent's authority brought home to the assured, he must be considered the agent of the company in receiving the application, and his acts and knowledge are the acts and knowledge of the company.

4. In this case it is held that while the court should have limited the plaintiff's recovery to the actual *cash* value of the property, that being the limit of the liability of the company under its charter, the omission was error without prejudice, inasmuch as the jury, in answer to special questions, fixed the value of the property at such a sum as prevented them from finding a verdict for *less* than the insurance and interest.

Error to Wayne. (Hosmer, J.) Argued April 18, 1890. Decided May 2, 1890.

Assumpsit on an insurance policy. Defendant brings error. Affirmed. The facts are stated in the opinion.

Conely, Maybury & Lucking, for appellant, contended:

1. Our statute recognizes incorporated and platted villages; citing How. Stat. §§ 1417, 2768, 2983, and the place where plaintiff's store was located was neither,—it was simply an ordinary country cross-roads; and, the property not being in a village, plaintiff cannot recover, the contract being *ultra vires*, and void; citing *Eddy v. Ins. Co.*, 72 Mich. 651.
2. Defendant being a mutual company, plaintiff was bound to know its rules and regulations as to membership, and as to the effect of a failure to disclose as to incumbrances, and that they were binding upon him. Tafft was Russell's agent in making the application, and he cannot excuse the misrepresentation made to defendant by saying that Tafft was defendant's agent; citing *Brewer v. Ins. Co.*, 14 Gray, 203, 209; *Hale v. Ins. Co.*, 6 Id. 169; *Smith v. Ins. Co.*, 24 Penn. St. 325; *Mitchell v. Ins. Co.*, 51 Id. 411; *Ins. Co. v. Stoy*, 41 Mich. 395; *Becker v. Ins. Co.*, 48 Id. 611; May, Ins. § 146; Wood, Ins. § 509; Angell, Ins. §§ 10, 146.

Dickinson, Thurber & Stevenson and *Charles S. McDonald,* for plaintiff, contended for the doctrine stated in the opinion.

MORSE, J. The plaintiff sued upon a policy issued by

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defendant, March 2, 1888, for one year. The insurance was $1,000 upon a two-story frame building occupied for general store purposes, and described in the policy as—

"Situated on the south side of Main street, in the village of Sumpter, Wayne county, Michigan."

Also, $200 on the store fixtures, and $200 on general stock of merchandise. August 5, 1888, the building burned, and was a total loss. The defenses insisted upon in this Court are that the property was not located in a village or city, and that there was a mortgage upon the premises at the time of the taking of the insurance, while the application stated there were no incumbrances.

It appears without contradiction that the application—the answers to the questions therein—was filled out by one Hiram Tafft, who solicited the insurance on behalf of the defendant, being employed as such solicitor by the insurance company. He had no authority to issue policies. He testifies that he filled out the application, relying upon his own knowledge and information, and the plaintiff signed it. He did not ask the plaintiff the question concerning incumbrances. Witness answered the question in relation thereto, "No," because the expiring policy (which plaintiff held in another company, and which witness had before him) did not say anything about paying the loss to a mortgagee. He did not think it necessary to inquire about mortgages except where loss was to be made payable to the mortgagee.

Plaintiff testified that when Tafft insured him, two years before, in the Continental Insurance Company, he asked plaintiff whether there was a mortgage on the property, and plaintiff told him there was one for $600 on the acre of ground where the store was, and that it also covered two acres on the opposite side of the street, including a saw-mill. Tafft asked him no questions about it

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when the application was made for insurance in defendant company.

The defendant is a corporation, organized under Act No. 82, Laws of 1873, being an act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties, approved April 15, 1873, as amended by subsequent acts (How. Stat. chap. 132); and it is only authorized to insure buildings—

"That constitute detached risks in villages and cities." How. Stat. § 4247.

Much testimony was given upon both sides as to the character of the place—a four corners—where this store situated. The court instructed the jury that it was a village, in the sense of the statute, being guided by the definition of "village" as given by Webster, to wit:

"An assemblage of houses in the country, less than a town or city, and inhabited chiefly by farmers and other laboring people."

It is the contention of defendant's counsel that the statute confines the risks to *incorporated* villages, or at least to those that are *platted*. We are not inclined to so limit it; but we think, from the facts of this case, that the question becomes unimportant. The application described the property as situate in the "*town* of Sumpter, south side of Main street." When the policy was issued, the word "village" was substituted at the home office of the company for the word "town." In no sense can the plaintiff be said to be responsible for this. He made no representation by word of mouth, nor by the signing of the application, that his property was situated in a village. He is not at fault if it is not a village. The defendant called this hamlet or collection of stores and houses at this four corners a "village," and under the circumstances it is now estopped from denying that it is a village because it is neither platted nor incorporated as

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such. The testimony shows this place to be a village in the common acceptation of the term. The company accepted this common understanding for the purposes of insurance under its charter, and it cannot now be permitted to insist upon a higher standard. If the property insured had stood alone in the country the case might have been different; but when, as the counsel for defendant admit, the question as to whether it was village property was so close that it ought to have been submitted to the jury upon the testimony, it is no more than justice that the defendant take its own definition, rather than that it be left to others to be determined largely upon opinions.

As to the second defense, it is claimed by the plaintiff that he did not read the application signed by him; that Tafft knew there was a mortgage on the premises; that Tafft was the agent of the company, and his knowledge was the knowledge of the defendant; and that therefore, in taking the application and issuing the policy as it did, the defendant cannot complain of the statement in the application that there was no incumbrance upon the property. But defendant's counsel, while conceding that this claim might be good if the defendant was a stock insurance company, insist that in a mutual company each person insured, being a member thereof, is bound to know the rules and regulations, and that they are binding upon him; and that in making the application Tafft was the agent of plaintiff, as well as of the company, and that he cannot excuse the misrepresentations made in the application by saying that Tafft was the agent of the defendant. The answer of plaintiff's counsel to this contention is that, under the law, plaintiff did not become a member of the defendant corporation until he received his policy, and that during the negotiations for the insurance a mutual company occupies no better or other posi-

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tion than one organized on the stock plan, and cannot profit by a contract induced by the fraud of its agent; that Tafft was therefore the agent of defendant, and not of plaintiff, when he wrote and forwarded the application.

It will be seen that the question to be determined is as to the agency of Tafft. Whom did he represent in making and taking this application? The rule now generally adopted by the courts, and the reasons for it, are well stated by Mitchell, J., in *Kausal v. Ins. Co.*, 31 Minn. 20, as follows:

"On principle, as well as from considerations of public policy, agents of insurance companies, authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers, and not of the insured, in all that they do in preparing the application, or in any representations they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and filling up the applications,—a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application; and, in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the insured." Bac. Ben. Soc. § 153, and cases cited; *Crouse v. Ins. Co.*, 79 Mich. 249, and Michigan cases there cited.

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This rule applies to mutual as well as stock companies. The assured does not become a member of the mutual company until he receives his policy.

"In the act of insurance he is not so [a member], but a stranger, and he becomes a corporator only by the consummation of that fact; and this does not convert the previous act of examination and description by the agent of the company into his act, and change it into a representation by him." Bac. Ben. Soc. §§ 156, 158; *Protection Co. v. Schell*, 29 Penn. St. 31; *Kausal v. Ins. Co.*, 31 Minn. 23; *Ins. Co. v. Cooper*, 50 Penn. St. 331; May, Ins. §§ 139, 140; *Ins. Co. v. Woodworth*, 83 Penn. St. 223; *Ellenberger v. Ins. Co.*, 89 Id. 464; *Nassauer v. Ins. Co.*, 109 Id. 507; *Bebee v. Insurance Co.*, 25 Conn. 51; *Bank v. Ins. Co.*, 31 Id. 517; Wood, Ins. (2d ed.) §§ 408, 409.

It seems to be settled by the weight of authority that there is no distinction between mutual and stock companies as to their responsibility for the acts of their agents in taking applications for insurance; and, upon principle, there is no good reason why there should be any. The assured does not become a member of the mutual company until he receives his policy, and there is generally no acquaintance upon his part with the charter or by-laws of the corporation when he makes his application; and the agents are fully as active and persistent, if not more so, in obtaining insurance as in stock companies; and there is no good reason for holding that a person must deal with such agents at his peril that does not apply equally to stock insurance. Therefore, if there is no limitation of the agent's authority brought home to the assured, the agent receiving the application must be considered the agent of the insurer, and not of the assured, and his acts will be held the acts of the company, and his knowledge the knowledge of the company. And when, as in this case, he fills out the application himself, and writes an answer that there are no incum-

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brances upon the property, when he has been told by the applicant that there is an incumbrance; or if he has knowledge that there is a mortgage upon the premises, and writes such an answer as above, without asking the applicant any questions, or bringing the matter to his attention in any way,—the company will not be permitted to avoid the payment of a loss upon a policy issued on such application, when, as in this case, the assured had no notice of any limitation upon the agent's authority, or of the fact that the existence of a mortgage upon the property insured had any effect upon the validity of his contract of insurance.

It is further claimed that the court erred in his instructions to the jury upon the subject of damages. Section 12 of the charter provides as follows:

"This company will not insure for more than two-thirds of the cash value of any property, and in case of loss will settle and pay all loss or damage, not exceeding the sum so insured, at the actual cash value of loss, to be determined at the time of adjustment of said loss."

It is contended that the court did not limit, as he should have done, the jury to a finding of the "actual *cash* value" of the property. The court, in his charge, did not use the words "actual cash value," as requested by the defendant, but said that the plaintiff had a right to recover—

"Such amount as he lost, such loss as he suffered, or such damage as will compensate him for the loss he has suffered,"—

Not exceeding $200 upon his store fixtures, or $200 upon his general stock, or $1,000 upon the store building; and, if they found the store was not worth $1,000, he could not recover any more than the jury found the value to be; and that the same would also be true as to the stock and fixtures. The verdict was for $1,407.83.

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The jury answered special questions to the effect that the store building was worth $1,500 and upwards at the time it was destroyed; the store fixtures, of the value of $400 and upwards; and the merchandise, over $2,500. While the court ought to have used the words "actual cash value" in relation to the loss, as requested by defendant, we are satisfied from the findings above that the damages found by the jury were not enhanced by the failure to do so. Finding, as they did, that the store was worth at least $1,500, the fixtures $400, and the merchandise $2,500, they could not, by their verdict, have assessed the actual cash value of the property destroyed any less than the amount of the insurance, and interest upon it.

The judgment is affirmed, with costs.

The other Justices concurred.

NEAL MCDONALD v. MARIE M. BOEING, EXECUTRIX, ETC.

Logs and logging—Neglect to break jams—Statutory remedy—Contract—Abandonment.

1. How. Stat. § 2035, which provides for the breaking of jams of logs caused by the failure of log-owners to make adequate provision therefor, and for driving the logs, gives a *new* remedy, and does not apply to cases where the parties interested have by contract fixed their rights and liabilities.
2. A request to charge which assumes that the jury may find that a parol agreement was not made suspending a written contract, when both parties insist that one was made, and the only dispute is as to the place where it was made, and its terms, is objectionable, as is one which only submits to the consideration of the jury the parol agreement claimed by one of the parties.

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8. A temporary suspension of work under a contract, for apparently good reasons, and without objection from the party affected thereby, cannot be construed into an abandonment of the contract.

Error to Wayne. (Gartner, J.) Argued April 22, 1890. Decided May 2, 1890.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

George W. Bates, for appellant, contended:

1. The conditions of a contract can be waived or abandoned by the acts and conduct of the parties, as well as by express agreement, and when once waived the contract is gone forever, and the party is precluded from claiming anything under it; citing *Jacox v. Clark,* Walk. Ch. 249; *Barrie v. Smith,* 47 Mich. 132; and the question of such waiver is one of intent to be determined from the surrounding circumstances as a fact in the case; citing *Ins. Co. v. O'Connor,* 29 Mich. 241; *Chapman v. Colby,* 47 Id. 45; *Dayton v. Monroe,* Id. 193.
2. In support of the claim that plaintiff is entitled to recover for driving that portion of defendant's logs driven after he abandoned the contract, counsel cited *Walker v. Bean,* 34 Minn. 429; *Osborne v. Lumber Co.,* 33 Id. 286; *Beard v. Clarke,* 35 Id. 324.
3. If the contract is abandoned, the recovery must be had under the statute, on the theory of the absence of contract relations between the parties. The owner of the logs becomes liable without regard to his assent to the acts or things for which he must pay. The statute imposes a duty to pay for services which, without it, being purely voluntary, would not be recoverable for in any other way; citing *Woods v. Ayres,* 39 Mich. 345; and it makes the party personally liable for his share of the "costs and expenses" incurred in thus driving the logs; citing How. Stat. § 2035; *Chapman v. Lumber Co.,* 20 Mich. 362; *Kroll v. Nester,* 52 Id. 70; *Butterfield v. Gilchrist,* 53 Id. 22; *Association v. Lumber Co.,* 72 Wis. 464; *Foster v. Cushing,* 35 Me. 60; *Tibbets v. Tibbets,* 46 Id. 365.

James T. Keena (*Isaac Marston,* of counsel), for defendant, contended:

1. If the parties were in contract relations with reference to the drive, there can be no recovery under the statute; citing *Walker*

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v. Bean, 34 Minn. 429; *Beard v. Clarke*, 35 Id. 327; *Ames v. Booming Co.*, 11 Mich. 146; *Woods v. Ayres*, 39 Id. 345.

2. In support of claim that the temporary suspension of driving was no evidence of abandonment, counsel cited *Walker v. Bean*, 34 Minn. 429; *Osborne v. Lumber Co.*, 33 Id. 286; *Beard v. Clarke*, 35 Id. 324.

GRANT, J. Wilhelm Boeing and Roderick McDonald were engaged in lumbering, in the winter of 1879 and 1880, in the vicinity of Mud lake, Roscommon county. The logs were banked and boomed upon the lake. They were to be driven through Backus creek to Houghton lake, on their way to market. Plaintiff put in about 4,000,000 feet, and Boeing about 13,000,000.

Boeing owned Mud lake, and on January 14, 1880, he and McDonald made a written contract by which McDonald was to have 25 acres of the lake for booming purposes, and land sufficient for rollways and roadways; and, if any of his logs became intermingled with Boeing's logs during the drive from the lake, Boeing agreed to drive them for the sum of $1.50 per 1,000. A storm broke the booms of both parties, and the logs became thoroughly intermingled, so that it was necessary to drive them together.

Plaintiff introduced evidence tending to show that Roderick McDonald and Boeing made a verbal agreement at the Bancroft House, in East Saginaw, in the spring before any driving was done, that each should put on his proportionate share of men, and drive together; that, pursuant to such agreement, each provided his proportionate number of men, and they simultaneously went to work upon the drive in May; that the stream was small, and they were able to drive but a few days, for want of water; that the drive ended May 20, when all the men were taken off; that, on July 27 following, both parties returned with their crews to the drive; that it was then arranged

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between them, through their foreman, that Boeing should drive above the State road, and McDonald below it, plaintiff claiming that this was done merely for convenience; that both parties continued on the drive until August 12, when Boeing took his crew off, for want of water above the State road; that McDonald continued to work below the road until August 22, when he also left on account of the low water; that on September 27 both crews again returned to the drive, and worked until October 14, when Boeing again took his men off,—Boeing's men during this time working above the State road, and McDonald's below, that McDonald continued the work upon the drive below the State road until November 13, when he was stopped by the cold weather.

The evidence on the part of the defendant tended to show that Boeing and McDonald made no such parol agreement for the drive as plaintiff claimed, but that they did make an agreement at Roscommon that, as it was impossible to drive the logs separately, Boeing should drive the whole quantity from Mud lake to the State road, and McDonald should drive the same from the State road to Houghton lake, and that Boeing performed this contract in so far as it was possible, working whenever the state of the water permitted, and stopping only because the water was exhausted.

Plaintiff, who is the assignee of Roderick McDonald, brings this suit to recover the proportionate share of the expense of the drive during which Boeing's men did not work, claiming that Boeing's proper share is three-fourths of such expense.

The declaration contains two counts,—one declaring upon the parol agreement above stated, the other declaring upon the statute (How. Stat. § 2035) which provides that, if any person or persons shall put, or cause to be put, in any lake, etc., any logs, etc., for the purpose of

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floating the same to the place of manufacture or market, and shall not make adequate provisions, and put on sufficient force, for breaking jams of such logs, etc., or for running or clearing the same from the banks or shores thereof, or for running or driving the same, and shall thereby hinder the removal of any logs from the banks or shores thereof, or shall thereby obstruct the floating or navigation of such lake, etc., then any other owner of logs, etc., upon such lake, etc., may run, drive, and clear them from the banks, and recover the costs and expense therefor.

At the close of the evidence, plaintiff's attorney abandoned the first count of his declaration, and claimed, under the second count, the right to recover under the statute, upon the theory that the written contract was abrogated and abandoned by the parol agreement claimed to have been made at the Bancroft House, and, if no such parol agreement was made, that such written contract was waived and abandoned by the acts of the parties in jointly putting men upon the drive.

It is evident that the written contract was suspended by some other arrangement or agreement between Boeing and McDonald. Under any theory of the case which can be based upon the evidence, a contract relation existed between them at the commencement of the drive. It is evident that each put his men to work pursuant to some agreement. The testimony on the part of each is that he put his men there by an express parol agreement, and that each carried it out as he understood it. Upon this branch of the case, therefore, the only question for the jury to determine was the terms of such agreement. There was no testimony upon which to base an abandonment of the written contract, except that they had substituted a parol contract for it. The rights of the parties in this case depend entirely upon the terms of that parol

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agreement. If it was as claimed by the plaintiff, then he would be entitled to recover under a proper declaration, provided the defendant did not perform the agreement. If the agreement was as claimed by defendant, then the plaintiff could not recover under the issue as here made, because—

"1. There is no claim, nor evidence tending to show, that Boeing's crews did not drive the logs down to the State road as fast as McDonald's men could take care of them.

"2. The declaration is not properly framed for such a case."

Both parties claiming that there was a parol agreement by which they agreed to drive the logs, and each claiming to have acted under it, and disagreeing only as to its terms, a contract relation existed between them, and the statute does not apply. The court and jury, under an issue properly framed, must determine what that contract was, and settle the rights of the parties accordingly. If there was an abandonment of any contract by Boeing which would entitle the plaintiff to recover, it was the parol contract, not the written one. There could be found no abandonment of this contract by Boeing until the jury had determined what the contract was. Plaintiff claimed no right to recover for the abandonment of the parol contract which he claims was made, but he requested the court to charge the jury that, if they found that no new agreement was made between the parties, then their rights in reference to running the logs, and their respective liabilities, would be governed by the statutes of this State relative thereto, if they should, further, also find that the agreement of January 14 was no longer in force, either because of the parol agreement made, as it was claimed, at East Saginaw, or by waiver or abandonment. This request assumed that the jury might find that there was no new agreement

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made. This would have been error, because both insisted that one was made, the only dispute being as to its terms; and, this being the case, there was no opportunity for the interposition of the statute. The request was objectionable for the further reason that it left to the consideration of the jury only the parol agreement claimed by plaintiff to have been made at East Saginaw, and left out of sight the parol agreement claimed by defendant to have been made at Roscommon. The object of this statute was to give such a remedy as did not exist before, and does not apply to cases where parties have by contract fixed their rights and liabilities.

If plaintiff intended to insist upon the abandonment of the parol contract by Boeing, the proof, we think, fails to show facts sufficient to maintain his claim. The men of both parties worked upon the drive in May, leaving at the same time. Both returned at the same time in July, and worked at the different places mutually agreed upon. Boeing's men left in August, a few days before McDonald's men left, because the water was too low to work. McDonald did not request Boeing to send his men down the river to assist him, and there is no evidence that they were needed. McDonald does not appear to have found any fault with their leaving. McDonald's men left the drive a few days after for the same reason. Their crews returned again at the same time in September, evidently by mutual understanding, and each crew worked at the same place as before. Both crews continued to work until October 14, when Boeing's crew left again for want of water, and because the stream below the road was full of logs. Plaintiff's witness who had charge of McDonald's men testifies that there were at that time logs enough in the stream below the road for them to take care of. It is apparent that Boeing's men worked on each occasion as long as they could upon that part of

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the river which, by mutual arrangement, had been allotted to Boeing to drive. Plaintiff does not deny this. McDonald did not at any time request Boeing to assist him upon the part of the river where he was driving, or make any protest against his leaving the work. We find nothing in such a state of facts to indicate that Boeing had abandoned his contract, or that McDonald so understood it. It was only a suspension, without objection from the party affected, and for apparently good reasons. Such temporary suspension of work cannot be construed into an abandonment, nor give operation to the statute. McDonald cannot be held to have been working under the contract when Boeing's men were at work, and under the statute when they were temporarily absent. It is highly probable from the record, as it appears to us, that the jury would have had no difficulty in determining what the parol agreement was. Be that as it may, the rights and liabilities of the parties depend upon the contract, and not upon the statute.

This disposition of the case renders a discussion of the question of damages unnecessary. Judgment is affirmed, with costs.

The other Justices concurred.

JOHN S. THOMPSON v. THE DETROIT & LAKE SUPERIOR COPPER COMPANY.

Contract—Hiring—Wages.

1. Where a foreman who has been receiving $125 per month for several years is engaged for another year without anything

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being said as to the wages to be paid, they will be presumed to continue at the old rate.

2. The charge in this case, when construed as a whole, is held to fairly submit the question of plaintiff's alleged hiring, and the date thereof, to the jury.

Error to Wayne. (Brevoort, J.) Argued April 22, 1890. Decided May 2, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Otto Kirchner, for appellant, contended:

1. It was for the jury to say what was the effect of the oral negotiations and understandings of the parties; citing *McKenzie v. Sykes,* 47 Mich. 294; *Spalding v. Archibald,* 52 Id. 365.

Conely, Maybury & Lucking, for plaintiff, cited no authorities.

LONG, J. The assignments of error in this cause all relate to the charge of the court.

It appears that the defendant operated a copper-smelting works in Detroit. The plaintiff had worked for many years for the defendant in various capacities, and for the last few years as engineer in defendant's Detroit works, and from June 1, 1881, as foreman of one of the shops. The record states the claim of the parties as follows:

"On the trial the plaintiff gave evidence tending to show that on or about June 1, 1881, he was employed as foreman of one of the smelting shops at $1,200 per year, which was subsequently increased to $1,500; that no definite time for such employment to continue was mentioned until about May 18, 1887, when Mr. Cooper, the general agent of the defendant, told plaintiff that he would not be needed after the end of May. On June 1, 1887, Mr. Edwin Reeder, the general agent in the absence of Mr. Cooper, whose time was principally spent at Lake Superior, engaged plaintiff for another year; Reeder stating that he had received telegraphic orders from Mr.

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Cooper to do so. The telegram was not read or shown to the plaintiff. He continued work until December 31, 1887, when he was discharged. He could get no other employment during the unexpired portion of the year."

The defendant gave evidence tending to show that on May 30, 1887, a telephone message was received at the office of the defendant that a message had been received at the telegraph office, as follows:

"MR. EDWIN REEDER:

"Keep Mr. Thompson this year, if he will stay. C. & H. may still send mineral to Detroit. Will write.

"J. R. COOPER."

That Mr. Reeder on the same day read the telegram to Mr. Thompson, who said, "All right," or something to that effect; that defendant's fiscal year closed March 31 each year; that the works at Detroit were permanently closed about the end of December, 1887; that it was not known in May or June, 1887, but that the works in Detroit would be run in 1888 as well as in 1887. This is, in substance, all the evidence contained in the record.

The plaintiff's contention on the trial was that Cooper, the defendant's general agent, on May 18, 1887, told him he would not be needed after the end of May, but that Mr. Reeder, the general agent in the absence of Cooper, on June 1, 1887, engaged him for another year, Mr. Reeder stating that he had telegraphic orders from Mr. Cooper to do so, and that to this arrangement the plaintiff assented. It is therefore claimed that this was an absolute hiring for one year from June 1, 1887, and that, the defendant having discharged him without cause on December 31, 1887, he is entitled to recover for the balance of the year,—five months,—at $125 per month; being at the rate of $1,500 per year, the wages which he had received for several years previous.

The defendant claimed on the trial, and that claim is insisted upon here, that on May 30, 1887, Mr. Reeder

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received the telephone message from the office of the telegraph company, and that this message was read to the plaintiff on the same day, and that the plaintiff thereupon replied, "All right;" that, it further appearing that defendant's fiscal year closed on March 31 each year, and that it was not known in May or June, 1887, whether the works could be run in the year 1888, and they having closed down on December 31, 1887, the jury might have found either that the plaintiff was employed only for the year 1887, in which case the plaintiff was not entitled to recover anything, or that plaintiff was employed until March 31, 1888, the end of defendant's fiscal year, in which event he was only entitled to recover for three months.

The court, among other matters, charged the jury as follows:

"Whether he hired him another year or not, I will not say; but it is for you to say exactly the language that the plaintiff used as to the time."

In another portion of the charge the court said:

"But, if you believe from all the evidence—that is, by a preponderance of evidence—that it was on June 1 that the parties had this conversation, then the plaintiff is to recover."

And again the court said:

"If you should think the plaintiff is entitled to recover, then he is entitled to recover the sum of $125 a month for five months, and interest at 6 per cent. per annum."

Counsel for defendant contends that, taking these portions of the charge, it left only one question to the jury,—that is, when the conversation was had between the parties that formed the contract,—and, if they found it was on June 1, then the court decided that plaintiff was entitled to recover for five months' wages; that this charge

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is inconsistent and contradictory, and the jury were absolved from the duty of determining whether there was any contract, but were directed to find for the plaintiff if they found that a conversation which may or may not have eventuated in a contract was had on a certain day, and that, so far as it directed the amount of the verdict for the plaintiff, it took from the jury the question what the contract was.

There would be much force in the contention of defendant's counsel if the charge was to be interpreted and conclusions drawn from these few detached sentences which he sets out in his brief. But the charge is to be construed as a whole; and the charge, taken together, is not open to the objections made here. The plaintiff's claim was that the contract was made on June 1, and that the hiring was for one year from that date. The court stated this claim to the jury, and from the whole charge it appears that this question was left fairly for their determination. The court expressly stated to the jury that, if they found the telegram was read to the plaintiff as testified by Mr. Reeder, the plaintiff could not recover; that is, the jury were told expressly that the only theory upon which the plaintiff was entitled to recover for any amount was that the contract was made on June 1, and for one year.

We see no error in the court's directing the jury that the sum should be at the rate of $125 per month. This was the wages he was receiving at the time of the new contract; and, if the contract was made as claimed, there being nothing said as to the amount of wages to be paid, it must be presumed that it was at the same rate.

This covers all the assignments of error that call for any notice. The court, in effect, gave the request which defendant now insists he should have given. The jury

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found a verdict in favor of plaintiff, and he had judgment thereon. The judgment must be affirmed, with costs.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. GRANT, J., did not sit.

MARTHA J. KINGMAN ET AL. v. JULIA H. SINCLAIR, EXECUTRIX, ETC.

Equity—Discharge of mortgage—Statute of limitations.

1. Equity will compel the discharge from record of an outlawed mortgage without requiring proof of the actual payment of the mortgage debt.

   So *held*, where, after 24 years of unquestioned possession and ownership of a farm, complainant, on procuring an abstract of title, found an undischarged mortgage of record, given 33 years before that date by the owner of the equitable title under a certificate of purchase from the State. The mortgage was due in one year from its date, and no payments were ever indorsed thereon, or on the accompanying note. The executrix of the mortgagee, to whom he willed his estate, refused to discharge the mortgage, claiming that the same had never been paid; whereupon complainant, who was not personally liable for the debt, filed a bill to compel such discharge. No evidence was offered of payment of the mortgage, or of any proceedings for its foreclosure; and a decree granting the relief prayed for is affirmed.

2. Where a bill is filed against the executrix of a mortgagee to compel the discharge of an outlawed mortgage, and the defense is based *wholly* upon the claim that the defendant did not feel authorized to discharge the mortgage as such executrix, the court may very properly require the complainant to prosecute the suit at her own expense, under How. Stat. § 8963.

Appeal from Ottawa. (Arnold, J.) Argued April 22, 1890. Decided May 2, 1890.

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Bill to discharge an outlawed mortgage, as a cloud upon complainant's title. Defendant appeals from a decree granting the relief prayed for. Decree affirmed. The facts are stated in the opinion.

Charles E. Soule, for complainants.

Ward & Ward, for defendant.

CAHILL, J. This case involves the question whether a court of equity will compel the discharge from the record of a mortgage against which the statute of limitations has run without requiring proof of the actual payment of the debt.

The facts are as follows: In 1863 complainant's husband bought an 80-acre farm in Ottawa county, and moved upon it with his family. Before his death he conveyed it to complainant, who continued to reside on it down to 1885, a period of 22 years. She leased it to a tenant for two years longer, and so was in the unquestioned possession and ownership of the property for 24 years before filing her bill. Desiring to sell the property, complainant, in 1887, procured an abstract of the title, and for the first time learned that there was an undischarged mortgage against the farm given March 11, 1854, by Franklin Nichols, who, at that time, owned the equitable title to the land by virtue of a certificate of purchase issued by the State of Michigan to him. The mortgage was given to Benjamin Allyn for $113.66, due one year after date, with interest at 10 per cent. No payment was ever indorsed on this mortgage, or on the accompanying note.

Benjamin Allyn, the mortgagee, died testate, in 1859, leaving his estate to defendant, Mrs. Sinclair, who was also executrix of his will. In September, 1887, the complainant applied to Mrs. Sinclair for a discharge of this

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mortgage, claiming that it was a cloud upon her title, and prevented her making a sale of it. She offered to pay the expenses of making a discharge, but Mrs. Sinclair refused to discharge the mortgage without payment. In June, 1888, complainant filed her bill in the Ottawa circuit court in chancery, to compel the discharge of this mortgage. The bill sets up the foregoing facts and prays that defendant as executrix,—

"May be required, by the order and decree of this court, to execute and deliver to complainant for record a discharge of said mortgage, thereby clearing the same from the record of the title to her said farm, and that, until such discharge shall be executed and delivered, a certified copy of the decree of this court may be recorded and stand in lieu thereof, and that complainant may recover her costs."

The defendant appeared, and answered, admitting the giving of the mortgage; that Benjamin Allyn was dead; that defendant was executrix; and that, so far as her knowledge of the matter extends, she knows of no payments on said mortgage, or suits or proceedings to foreclose the same. She admitted that she refused to discharge the mortgage without compensation, because she knew said mortgage had not been paid; claims that the bill is inconsistent and contradictory in stating that the mortgage was both paid and outlawed; and says that, if complainant would do justice and equity in the premises, she would pay said mortgage; denies that complainant is entitled to any relief; and prays the same advantage of her answer as if she had demurred.

Proofs were taken in open court before Hon. Dan J. Arnold, circuit judge. No evidence was offered of actual payment of the mortgage, or any part of it, principal or interest, nor was there any evidence that any suit or proceeding had at any time been commenced to foreclose

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the same; and a decree was rendered in favor of the complainant. Defendant appealed.

The claim made by defendant is that, when complainant seeks the aid of a court of equity, she must be willing and ready to do equity; that the moral obligation to pay her debt remains as strong after the running of the statute of limitations as before, and calls upon her to pay the debt; that equity will not and ought not to compel the discharge of this mortgage without actual payment. But this doctrine, if correct, applies only when complainant personally owes the debt which the mortgage was given to secure. *Booth v. Hoskins*, 75 Cal. 271. This mortgage was given by some former owner of an equitable interest, and complainant says she never knew of it until 1887. She could not have bought the land subject to it in such a way as to make her personally bound to pay it legally or equitably. It was once a lien upon her land; it was never a claim against her. What she seeks is to have this lien, which once existed in fact, and still exists of record, as a cloud on her title, removed.

It appears from the testimony that this mortgage is not a mere fancied cloud upon the complainant's title; that she has sold the land, but that the purchaser insisted upon keeping back a part of the purchase money until this apparent mortgage is released.

If the defendant, in her capacity as executrix, did not feel authorized to discharge this mortgage, and had based her defense wholly upon that position, disclaiming any right to or interest in the mortgage so far as it constituted a lien upon the complainant's land, the court could very properly have required the complainant to prosecute the suit at her own expense. How. Stat. § 8963. But this the defendant did not do. She defended upon the merits,

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claiming that the complainant was not entitled to the relief prayed for, and we think the decree below should be affirmed, with costs.

The other Justices concurred.

WILLIAM H. JOHNSON AND THOMAS COLLINS v. THE FISHER & WILSON COMPANY (A CORPORATION) AND NATHAN D. FISHER.

Settlement—Fraud—Rescission.

1. It cannot be true, as a legal proposition, that, in every case where there is an honest difference of opinion in reference to the terms of the contract, or where the buyer, in good faith, objects to the quality of goods purchased as not being up to the standard of the contract of purchase, upon adjustment of differences and settlement the seller may, with an intention of instituting a suit upon a claim of being defrauded in the settlement thereafter to be made, proceed to such adjustment, and to a compromise and settlement of the demand, and recover from the purchaser damages for an alleged fraud in the settlement.
2. Fraud and overreaching in the compromise and settlement of claims have been regarded as affording grounds for the recovery of damages in actions of trespass on the case: but no court has gone so far as to hold that a settlement voluntarily sought and made, where there has been no concealment of facts and no misrepresentations which have induced a party to enter into the compromise, and where there has been an honest difference of opinion as to the subject-matter compromised, furnishes a ground for such an action.

Error to Alpena. (Kelley, J.) Argued April 22, 1890. Decided May 2, 1890.

Case. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

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Turnbull & Dafoe and *Frank Emerick*, for appellants, contended:

1. Fraud consists in deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed; citing Cooley, Torts, 474, and cases cited.
2. Plaintiffs had the legal right, under the circumstances, to affirm the settlement, and sue for the fraud practiced in bringing it about; citing *Jewett v. Petit*, 4 Mich. 513; *Walsh v. Sisson*, 49 Id. 424; *Pangborn v. Ins. Co.*, 67 Id. 683.
3. It is a legal fraud for a party to obtain a settlement or compromise from another by unfair means, as by acting oppressively or taking undue advantage, or by asserting claims which the party knows to be wrongful; citing *Headley v. Hackley*, 50 Mich. 43.
4. If the defendants knowingly asserted an unjust claim, and induced plaintiffs to compromise, or if it was a scheme on their part to beat plaintiffs out of what was their just due, they were guilty of fraud; citing *Nash v. Lumber Co.*, 75 Mich. 346
5. The parties to a compromise must assert their claims in good faith, and there must be no fraud or undue advantage; citing *Kercheval v. Doty*, 31 Wis. 486; *Zimmer v. Becker*, 66 Id. 531.

Shields & McNamara, for defendants, contended:

1. It is admitted by the plaintiffs that at the time of this settlement they knew every fact connected with the claimed fraud of the defendants, as fully as at the time of the trial. The settlement was therefore absolutely conclusive; citing *Mayhew v. Ins. Co.*, 23 Mich. 105; *Hull v. Swartwout*, 29 Id. 219; *Hart v. Gould*, 62 Id. 262; *Reid v. Ladue*, 66 Id. 22.

CHAMPLIN, C. J. The declaration in this case consists of two counts,—one in case and the other in trover.

The first count alleges that the plaintiffs were engaged in the lumber business at Alpena, and that the defendants, one a corporation duly organized, purchased of them two cargoes of lumber at the following prices, viz., for the grade of clear, $36; for the grade of common, $16.25; for the grade of shipping culls, $8.25; and for the grade of mill culls, $6,—per 1,000 feet, to be paid for 90 days from the date of shipment, and that the defendants on

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November 3, 1888, caused a portion of the lumber to be shipped to the corporation at Cleveland upon the barge Schnoor, viz., 2,081 feet of clear, 187,131 feet of common, 81,265 feet of shipping culls, and 10,120 feet of mill culls, and defendants on November 5, 1888, caused the balance of said lumber to be inspected and shipped to said corporation upon the barge Light Guard,—399 feet of clear, 62,210 feet of common, 28,426 feet of shipping culls, and 6,445 of mill culls.

That, after defendants caused the lumber to be inspected and shipped as aforesaid, with intent to cheat and defraud the plaintiffs out of portions of the lumber and out of pay for said lumber, they falsely and fraudulently pretended that they had not purchased said lumber, and that said lumber was of an inferior grade or quality, and that defendants had not caused said lumber to be inspected and shipped, and that said lumber had not been inspected fairly and correctly, and with like intent falsely and fraudulently refused to accept and pay for said lumber at the said contract prices, and with like intent falsely and fraudulently refused to allow the said lumber shipped upon the said barge Light Guard to be landed or stored upon their dock, and plaintiffs were obliged to take just what they could get for this said load, and resold it at a great loss.

"And plaintiffs further say that, in truth and in fact, the defendants had purchased said lumber as aforesaid, that said lumber was not of an inferior grade or quality, that defendants had caused said lumber to be inspected and shipped as aforesaid, and that said lumber had been inspected fairly and correctly, all of which the defendants well knew.

"And plaintiffs say that defendants represented that all they would pay plaintiffs for all of said lumber and their said damages was $3,426.03, and insisted and compelled plaintiffs to give release or receipts in full for all demands

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before the defendants would pay plaintiffs this said sum; and the plaintiffs did, on or about March 9, 1889, receive this said sum of defendants, and executed and gave said release or receipts, and made said compromise, as demanded of them by defendants as aforesaid.

"And plaintiffs allege that these said releases, receipts, compromise, and settlement were obtained by fraud, and that the defendants well knew at the time they paid plaintiffs said sum of money and obtained said receipt—made said compromise—that said defendants were justly indebted to plaintiffs in the sum of $4,300, and only set up said false and fraudulent pretenses and excuses for the purpose of cheating plaintiffs, and making them take less than what defendants well knew was then due them for said lumber and said damages; and the defendants then well knew that all of these said pretenses and excuses as aforesaid were unfounded, and were set up by them solely for the purpose of extorting from plaintiffs' necessities and situations a receipt in full, and a full acquittance of all of defendants' said liability to plaintiffs on account of said lumber transaction.

"And plaintiffs say that defendants falsely and fraudulently set up said excuses and pretenses after they had caused said lumber to be removed a long distance from plaintiffs' place of business, and to a place where it was very expensive for plaintiffs to take care of the same; and these said false and fraudulent excuses and pretenses were set up solely by defendants for the fraudulent purpose of forcing plaintiffs to take less for said lumber than said contract price, and less than real value of said lumber, and that said actions of said defendants in refusing to accept and pay for said lumber was a scheme of fraud on their part to defraud and cheat plaintiffs out of portions of said lumber, or make and force them to take less than the value of said lumber, and, by the said fraudulent actions, doings, and pretenses of defendants, the plaintiffs were forced to take less than the said contract price, and less than its value, for portions of said lumber, and were forced and compelled to take the said sum aforesaid from defendants, and give the said receipt and make the said settlement.

"And plaintiffs say that, by the said actions and doings of defendants as aforesaid, plaintiffs have been deceived, defrauded, and cheated in this said lumber transaction

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against defendants, and to compromise and settle in full, with defendants; and in accepting said sum of money and giving said receipt, and by means of the premises, the plaintiffs have been cheated out of a large sum of money, to wit, $1,000; and by means of the premises the plaintiffs have been cheated and defrauded out of a large portion of said lumber, to wit, 100,000 feet, which the said defendants have converted to their own use, to plaintiffs' damage of $1;000."

The plea was the general issue.

On the trial the plaintiffs showed by Edward H. Savage that in October, 1888, he was a member of the firm of W. H. Whittemore & Co., who were lumber inspectors at Bay City; that on October 21, he met Mr. N. D. Fisher, who was the main manager of defendant corporation, at a hotel in Alpena, and had a conversation with him, and told him of the Collins & Johnson stock and about the H. R. Morse stock of lumber, and told him the H. R. Morse stock of lumber was a good lot of lumber, that W. H. Whittemore & Co. had bought the lumber for $8.50, $16.50, and $36, and shipped it to Lockport for Ives-Jackson Lumber Company, and told him that he was pretty sure he could buy it for $8.25, $16.25, and $36; that this was the Collins & Johnson stock, and he told him, if he could get it for $8.25, and $16.25, to buy a cargo of it; that Mr. Fisher left Alpena that night upon the boat; that on the next day, Monday, he went over to Collins & Johnson's office, and had a talk with Johnson, and went with him and looked the lumber over, and asked him if he would take $8.25, $16.25, and $36. Finally Collins & Johnson came to him, and told him he could have the lumber for $8.25, $16.25, and $36, and he then wired Fisher that he had closed the trade. This telegram was afterwards produced and identified by the witness, and it reads as follows:

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"ALPENA, MICH., October 22, 1888.

"To N. D. FISHER:

"We will ship you a small cargo of C. & J. stock.

"W. H. WHITTEMORE & Co."

Mr. Fisher replied to this by letter as follows:

"CLEVELAND, OHIO, Oct. 26, 1888.

"MESSRS. W. H. WHITTEMORE & Co., "Alpena, Mich.

"*Gents*—I rec'd your telegram at Cheboygan, saying you would send a small cargo of the Collins & Johnson stock. We may be able to put in one of our boats for it, and if not may send some other. The Schnoor is here now, and we may get her to go for it; and if so will wire you, and if not will advise you in a few days if one of our boats can take it or not.

"Yours truly,

"N. D. FISHER."

On the 27th and 28th, Fisher sent telegrams saying, in substance, that the boat sent was the Schnoor. The lumber was laden upon the Schnoor, and inspected by Savage for W. H. Whittemore & Co., who made a statement of the measurement and inspection as follows: Uppers, 2,081 feet; common, 187,131 feet; culls, 81,265 feet; mill culls, 10,120 feet. On November 6, 1888, plaintiffs received the following telegram:

"CLEVELAND, OHIO, Nov. 6.

"To COLLINS & JOHNSON:

"Cargo by Schnoor will have to be reinspected, if we receive it. You can choose from Boggs Brothers, Alpena, Martin & Schillerman, Cheboygan, or E. J. Vance & Co., at Bay City. Attend to it at once.

"THE FISHER & WILSON Co."

On the same day, plaintiffs telegraphed defendants as follows:

"Nov. 6, 1888.

"To FISHER & WILSON Co., Cleveland:

"You gave W. H. Whittemore & Co. instructions, in

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writing, to ship our lumber which was purchased by N. D. Fisher. What is the matter?

"COLLINS & JOHNSON."

The following correspondence then ensued:

"CLEVELAND, O., Nov. 6, 1888.

"MESSRS. JOHNSON & COLLINS:

"*Gents*—Yours by wire rec'd. We beg leave to say we never gave Mr. Savage written instructions to ship your stock. He was representing your stock to writer when in Alpena. I did not go to see it, as it was on Sunday night, and I left that night by boat; but, upon his representation of the quality and kind of stock, I told him we would try a small cargo. A cargo came, consigned to us from him on prop. Schnoor, but, instead of being 6-inch strips and wide boards, as represented, is a lot of coarse, promiscuous boards, and not what we want or bought; and, besides, the inspection we could not accept.

"Yours truly, N. D. FISHER."

"CLEVELAND, O., Nov. 6, 1888.

"MESSRS. COLLINS & JOHNSON, Alpena, Mich.

"*Gents*—A cargo of boards shipped for you by Savage to us on prop. Schnoor is not as represented by him, and the inspection is not satisfactory, and we will not take it under his inspection. We wire you to this effect, and name three inspection firms from which you can choose inspectors to rehandle the stock; otherwise, you can take the stock and make other disposition of it. It has been put on dock and must be removed at once, so please designate your choice at once.

"Yours truly, N. D. FISHER."

"CLEVELAND, O., Nov. 7, 1888.

"MESSRS. JOHNSON & COLLINS:

"*Gents*—Your two invoices of lumber on Schnoor rec'd. We had unloaded the Schnoor before we knew what the lumber was, or else we would not have received it. Your representative, Mr. Savage, represented to us an entirely different stock at $8.00, $15.75, and $36.00; and we bought of him one small cargo on four months, to be good 6-inch strips one-half, and good wide boards the other half. We find no such stock in the shipment, and we reject the entire lot; and you will please make disposition of it at once, and get it off our dock, as we

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need the room. Lumber on Light Guard cannot go onto our dock.

"Yours truly, N. D. FISHER."

"CLEVELAND, Ohio, Nov. 10, 1888.

"To JOHNSON & COLLINS:

"We want your lumber removed from our dock at once.

"FISHER & WILSON Co."

"ALPENA, November 10, 1888.

"FISHER & WILSON Co.:

"*Gentlemen*—Your telegrams and letters are at hand. We are very much surprised at their contents. Mr. Savage has written you his understanding of the trade. We have sold this same stock this season at the same price, and got better inspection. We understand by your letter of Oct. 26 to Whittemore that you authorized the purchase of the lumber on the terms, $8.25, $16.25, and $36.00, 90 days. Your telegram to H. R. M. and letter, to our mind, clearly authorized the purchase of the lumber by Savage. It seems to us that any differences should be settled with him, and not with us.

"COLLINS & JOHNSON."

"CLEVELAND, Nov. 12, 1888.

"MESSRS. JOHNSON & COLLINS:

"*Gents*—Yours 10th rec'd and noted. What we bought of Mr. Savage was good strips and wide boards, under a very strong representation, and the price, $8.00, $15.75, $36.00, on four months' time. The stock is nothing that we bought, and is not what we want; and we would not buy such stock at over $11.50 per thousand, as we consider it not much better than box lumber. We prefer to have it taken off our dock even at that; and, if you dispose of it and move at once, we will make no charge for dockage or moving it over our yard. Mr. Morse wired us he had sold Savage, for us, 125 thousand of his stock at $8.00, $16,00, $36.00, which we supposed was to fill out the Schnoor's cargo; and we answered him we approved of it, but subsequently learned it was not on that cargo, and advised Mr. Morse we did not want it. We are sorry to give you any trouble, but we cannot submit to such imposition on the part of Mr. Savage. We did not know you in the trade, and, if you wish to throw the matter on him, we have no objection. The

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stock is not what we bought, and we have not touched it, and will not, but we want it out of our way.

"Yours truly, N. D. FISHER."

Mr. Collins testified in his own behalf that he wanted to see what authority Savage had to buy, and he showed him the letter from Fisher to W. H. Whittemore & Co. of date October 26, 1888, and that he relied upon this letter in making the sale; that he never had a personal interview with any of the defendants, and, if the plaintiffs had been defrauded or overreached in any way or manner, it consisted of, and is set forth in, the above letters and telegrams.

It appears that the parties did not come to an accommodation, and that, some time in the winter following or early spring, Mr. Comstock, of Alpena, their banker, visited Cleveland upon his own business, and plaintiffs requested him to see defendants and see what could be done,—to see what they were willing to do to effect a settlement. He saw Mr. Fisher, and tried to get Fisher to settle it up,—told him that he thought plaintiffs were willing to throw off something. Fisher claimed that they did not buy the lumber, and wanted them to come and take it away. He told Fisher that that was pretty hard for a man living so far away to do, advised them to fix it up in some way, and asked him if they could not afford to take it at half a dollar—or something like that—less, and settle it up. Fisher said, "No, the lumber was not worth that price," but finally said he would pay for it less one dollar and a half a thousand. Comstock told him he would submit the proposition to Collins when he got back. He did so, and they refused. After a while Collins went to Comstock, and told him they would take it. Comstock then wrote to defendants at Cleveland, stating, if they would send up a check for the amount less one dollar and a half a thousand, that Collins &

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Johnson would take it. Fisher & Wilson Co. sent the check, and he showed it to Mr. Collins; and he said it was not right, and brought to him the bill, and it came to more,—some $20 or $25. There was a mistake made in carrying out one of the items. Comstock then sent the check back, explaining the mistake, and defendants returned another check for the amount that Collins said it should be. He delivered this check to Collins, who at the time signed the following receipt:

"CLEVELAND, O., Mar. 9, 1889.

"Received from the Fisher & Wilson Company three thousand four hundred and twenty-six dollars and three cents, in full of all accounts and demands to date.

"$3,426.03. JOHNSON & COLLINS."

Plaintiffs also introduced testimony tending to show that the lumber shipped on the Schnoor was of the inspection stated in the statement made by Savage, and that it was worth the prices sold for to defendants.

It further appears from the testimony of Mr. Collins that it was the intention of Collins & Johnson, before the settlement was made, to settle with the Fisher & Wilson Company upon the best terms they could get, and then to sue the Fisher & Wilson Company for the balance, and that they did not disclose such intention to the defendants. It was also claimed by the plaintiffs that the reason why they settled upon the terms they did was because they wanted to use the money in their business, and in order to get it were forced to make the settlement. But the fact of their financial stress was not communicated to defendants. Mr. Collins also testified that he supposed that when he took the money and gave the receipt the defendants had every reason to believe that it was a full settlement of all differences between plaintiffs and defendants.

It is proper to mention one other fact. The plaintiffs'

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witness Savage did not agree to buy, as shown by his testimony, any mill culls. He bargained for shipping culls at $8.25, for common at $16.25, and for uppers at $36 The cargo shipped contained 10,120 feet of mill culls, for which plaintiffs claim $6 a thousand, and this was included in the bill sent by plaintiffs to defendants.

Upon the foregoing facts, the question is whether the plaintiffs are entitled to maintain this action, grounded upon fraud committed by the defendants in making the settlement. The circuit judge held they were not, and directed a verdict for the defendants. We are of the same opinion. The defendants are not charged with any fraud in the purchase of the lumber, but with fraudulent conduct, after obtaining possession, to force the plaintiffs to an unjust compromise and settlement. We think the case is barren of any testimony whatever tending to show fraud on the part of the defendants. By their own testimony, the plaintiffs shipped mill culls to the defendants in the cargo which they neither authorized the firm of W. H. Whittemore to buy, nor which Savage, acting for the firm, did buy.

It cannot be true, as a legal proposition, that, in every case where there is an honest difference of opinion in reference to the terms of the contract, or where the buyer, in good faith, objects to the quality of goods purchased as not being up to the standard of the contract of purchase, upon adjustment of differences and settlement the seller may, with an intention of instituting a suit upon a claim of being defrauded in the settlement thereafter to be made, proceed to an adjustment of differences, and a compromise and settlement of the demand, and recover from the purchaser damages for an alleged fraud in the settlement. If this should be established as law in this and other states, it might make it quite embarrassing for merchants and dealers in this State who

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purchase goods through brokers in Boston or New York, and who upon the receipt of the goods should find that they were not of the kind or quality bargained for, and who upon a settlement or compromise of the difficulty should find themselves, upon visiting those cities, sued or arrested for fraud in the settlement. The Boston or New York wholesale dealer would no doubt find but little difficulty in establishing by the broker who sold the goods that they were fully up to the contract, and the vendor could truthfully swear that he required the money for use in his business.

Fraud and overreaching in the compromise and settlement of claims have been regarded as affording grounds to recover damages in actions of trespass upon the case; but no court has gone so far as to hold that a settlement voluntarily sought and made, where there has been no concealment of facts and no misrepresentations which have induced a party to enter into the compromise, and where there has been an honest difference of opinion as to the subject-matter compromised, furnishes a ground for an action on the case for damages. None of the cases cited supports the contention of the plaintiffs under the facts of this case.

The judgment is affirmed.

The other Justices concurred.

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JOSEPH CULLEY v. MELVIN C. WALKEEN.

Practice in circuit court—Impaneling jury—Assault and battery —Evidence—Character.

1. The business of courts cannot be delayed to suit the convenience of suitors.

   So *held*, where, after the counsel for plaintiff had announced themselves as satisfied with the jury, the defendant's counsel stated that his client was absent, and that he did not desire to examine or impanel the jury until he arrived, and was directed to proceed with the examination, and the jury was impaneled in the defendant's absence.

2. In a civil suit for assault and battery, the defendant testified that the plaintiff attacked him with a knife, which he did not identify, but called a witness who was present, who, after testifying that he did not see the knife at the time, but that a few days afterwards he was shown a knife which the defendant claimed was the one used by the plaintiff, was asked "what kind of a knife it was," and the answer is held properly excluded.

3. Where justification, by way of self-defense, is pleaded in a civil suit for assault and battery, it is competent to show the character of the opposite party as being quarrelsome or otherwise, when such fact has been brought to the knowledge of the defendant prior to the assault complained of; citing *Galbraith v. Fleming*, 60 Mich. 403; but the testimony of a third person to a knowledge of such fact, unless communicated to the defendant before the affray, is irrelevant.

4. In a civil suit for assault and battery it became a disputed question of fact whether one of the injuries complained of was inflicted by the defendant, or resulted from the action of the plaintiff after the affray, and it is held error not to submit the question to the jury.

Error to Alpena. (Kelley, J.) Argued April 23, 1890. Decided May 2, 1890.

Trespass. Defendant brings error. Reversed. The facts are stated in the opinion.

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Sleator & Greening, for appellant.

Turnbull & Dafoe, for plaintiff.

[The points of counsel are stated in the opinion.—REPORTER.]

CHAMPLIN, C. J. Culley sued Walkeen for damages in consequence of an assault and battery. Walkeen pleaded that he acted in self-defense. Plaintiff recovered a verdict and judgment, and defendant brings error.

The first error assigned is in compelling the defendant's attorney to proceed in the absence of his client, and impanel a jury. The business of courts cannot be delayed to suit the convenience of suitors. The error is not well assigned.

The defendant gave testimony in his own behalf, and testified that he knew the plaintiff; that he was a powerful man, and quarrelsome; that he had seen a fight between the plaintiff and a policeman and another man, and he detailed what he saw when the policeman tried to arrest him, and that he stood in fear of him; that plaintiff was the aggressor, and what he did was simply in self-defence. On cross-examination, he admitted to having had trouble with drunken men in his saloon. Defendant, on his direct examination, had testified that he had retreated from Culley into an adjoining room, and had shut the door, and endeavored to keep Culley out, but that he kicked the door in, and came in and attacked him with a knife; that he seized him by the wrist, and the knife dropped upon the floor. He also produced a witness by the name of M'Millen, who testified that he saw the fracas between Culley and defendant, and told of Walkeen's retreating to the adjoining room, and of Culley shoving the door in. He was asked if he saw a knife around there anywhere, and he said he did not until afterwards; that he did not see it at that time at all;

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that he went in a few days afterwards, and commenced joking defendant about the racket, and he showed witness a black-handled knife, and said Culley had that knife. He was then asked:

"*Q.* What kind of a knife was this?"

The exclusion of this question is assigned as error. The question was rightly excluded. Walkeen had been sworn, and had given his testimony, and had not identified the knife. It is plain that he could not identify the knife by this witness.

Victor Laurie was introduced as a witness by defendant. He was the police officer who arrested Culley upon the occasion testified to by Walkeen, when Culley made such desperate resistance, and, after calling the attention of the witness to the occurrence, he asked him to state what it was. The question was objected to as incompetent, irrelevant, and immaterial. The defendant's counsel stated to the court as follows:

"I desire to show by this witness the nature of the disturbance, the fight that took place between him and the plaintiff at or near Mr. Beck's place of business, being the same disturbance that the defendant witnessed. I want to show the blows that were struck this man by the plaintiff, and all of the disturbance that took place there. I want to show how the plaintiff acted, what force he used, and what he did to this policeman; being the same identical transaction that has been testified to by defendant that he witnessed."

The court excluded the testimony. It should have been admitted for the purpose of showing to the jury the disposition and strength of the man. It would have some tendency to show whether his conduct on that occasion was calculated to inspire terror in the mind of defendant, and to cause him to stand in fear of him as a dangerous man.

The witness Laurie was asked:

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"State, if you know, whether or not the plaintiff in this case was a person of a quarrelsome disposition, or of a peaceable disposition, previous to August 16, 1888."

Objection was raised to the relevancy of the question to the issue, and the objection was sustained. In ordinary actions of assault and battery we have held that character was not in issue, unless made so by the pleadings. *Fahey v. Crotty*, 63 Mich. 383. Where justification, by way of self-defense, is pleaded, it is competent to show the character of the opposite party as to being quarrelsome or otherwise, when such fact has been brought to the knowledge of the defendant prior to the assault complained of. *Galbraith v. Fleming*, 60 Mich. 403. But unless such fact, within the knowledge of another person, is brought to the knowledge of defendant before the affray, it could not possibly have influenced his mind or actions, and would be irrelevant. It was not proposed in this case to show that Laurie had told defendant that Culley was of a quarrelsome disposition, and it was therefore rightly excluded. The court permitted the defendant himself to state what he knew in regard to the plaintiff being a quarrelsome tempered person, and a dangerous man, and that defendant feared him.

The seventh request of the defendant's counsel was as follows:

"If you should believe that the injury to plaintiff's arm was the result of an accident, or that any injury received by him was the result of an accident, he cannot recover in this action for such accidental injuries."

The court refused to so instruct the jury, and the point is not alluded to in his general charge. This request was based upon the testimony introduced by the plaintiff, which tended to show that the most serious injury of which he complained was a fracture of a bone in the forearm, called the "ulna," near its lower extremity, or just

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back of the wrist. The doctor had testified that it must have been caused from a downward blow.

The defendant introduced testimony tending to show that when the officers were taking Culley to the lock-up, as he was passing by where some kerosene barrels were standing, and as he did so, still being very angry, he struck the barrel in such manner that the blow might have caused the fracture, by the arm coming in contact with the chime of the barrel. Two witnesses detailed the circumstances. One of them was close to the plaintiff at the time, and thought the blow was sufficient to break something on his arm at the time, and he followed to the lock-up, and asked the officer, as he testifies, if he broke his arm on the barrel. The fracture of the arm was not discovered until he got to the lock-up. The plaintiff, to rebut this testimony, introduced the officer, who denied the conversation, and he and the other officer who took him to the station denied the occurrence. It was therefore a disputed question of fact, and should have been submitted to the jury. The other errors assigned are overruled.

For those noted above, the judgment must be reversed, and a new trial granted.

The other Justices concurred.

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ROBERT RAYBURN AND FRED W. RAYBURN v. ANDREW W. COMSTOCK ET AL.

[Case No. 1.]

Logs and logging—Contract—Breach—Measure of damages—Evidence.

1. Where, after one year's operations under a logging contract, the contractors are notified by the land-owners not to cut any more timber, and are refused the supplies agreed to be advanced to enable them to perform the contract, they have the right to seek other employment upon the strength of such notice and refusal, which they cannot be forced to abandon by a subsequent notice from the land-owners to proceed at once and perform the *first* contract.
2. Where, in such a case, the land-owners proceed to cut a portion of the timber themselves, and let the contract to a third party to remove the remainder, the contractors are fully justified in treating the contract as broken by the land-owners, and may recover damages for its breach the same as if no notice to proceed had been served upon them.
3. In a suit for the breach of a logging contract by being prevented from cutting and removing the timber, the difference between the cost of such cutting and removal and the contract price is held, under the testimony in this case, to be a proper measure of damages.
4. Evidence of what it is worth to perform certain labor is inadmissible where both parties claim that it was performed under a parol contract, and only differ as to the contract price.

Error to Alpena. (Simpson, J., presiding.) Argued April 22 and 23, 1890. Decided May 2, 1890.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

Turnbull & Dafoe, for appellants, contended:

1. If after a promisor has notified the promisee that he will not allow him to complete the contract, and before damages have

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accrued to the promisee, or before he elects to treat such notice as a breach, the notice is recalled and consent given to such performance, no damages can be recovered by the promisee; citing 3 Am. & Eng. Encycl. 906; *Howard v. Daly*, 61 N. Y. 375; *Zuck v. McClure*, 98 Penn. St. 541; *Nilson v. Morse*, 52 Wis. 240.

2. The plaintiffs alleged a readiness to perform on their part during all of the time, and a refusal by defendants to permit such performance, but their proof negatives this averment, hence they cannot recover; citing *Thomas v. Corey*, 74 Mich. 216.

3. Some courts go so far as to hold that if one bound to perform a future act, before the time for performance, declares his intention not to do it, this is no breach of the contract; citing 2 Pars. Cont. 676.

4. The silence of the plaintiffs gave defendants to understand that they had no further interest in the contract, as plainly as if express notice had been given of the fact; and the defendants had a right to rely on the fact that the contract had been rescinded or abandoned, and damages waived, which might be done by mutual consent; citing 2 Pars. Cont. 677; *Barton v. Gray*, 57 Mich. 636, and cases cited.

5. The right to elect as to breach of contract is one which cannot rest merely in the minds of the plaintiffs; the amount of damages might depend upon it; citing *Goodrich v. Hubbard*, 51 Mich. 70; and the right of election is lost by unreasonable delay; citing *Hill v. Mathews*, 78 Mich. 377.

6. On the question of damages, counsel cited *Petrie v. Lane*, 67 Mich. 454; *Leonard v. Beaudry*, 68 Id. 312.

Depew & Rutherford and *George H. Sleator*, for plaintiffs, contended:

1. On the measure of damages, and in support of the rule laid down by the trial judge, counsel cited *Burrell v. Salt Co.*, 14 Mich. 39; *Goodrich v. Hubbard*, 51 Id. 62.

MORSE, J. The plaintiffs entered into a contract with defendants, November 13, 1885, in which they agreed to go upon certain lands of defendants, and cut, haul, and deliver at the west branch of Hubbard lake, upon what is known as the "Lockwood Landing," all the timber suitable for saw-logs, for the sum of $3 per 1,000 feet. From two to three millions of said timber was to be deliv-

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ered each year, until all was delivered. The timber was to be cut clean, and in a prudent manner, and all to be cut that was suitable for lumber or shingles. Said logs were to be well landed and on skids, and well rolled up. Supplies were to be furnished out of the store of defendants, and money provided to pay the men employed by plaintiffs, April 1, 1886, and the balance, if any, to be paid June 1, 1886, for the logs cut and delivered the first winter. The timber put in the second year was to be paid for April 1 and June 1 of 1887, as above.

The plaintiffs went onto the job in the fall of 1885, and that winter cut and delivered about two million feet, and were paid for it according to contract. The plaintiffs claim that they faithfully performed their contract for the first year, and were always ready and willing to perform the whole contract, but that they were prevented from doing so by the defendants. They bring this suit, alleging a breach of the contract on the part of the defendants, and claiming damages for such breach. They also count upon an agreement with defendants in relation to picking up and gathering about 2,500,000 feet of sawlogs scattered around the shores of Hubbard lake, and putting them in booms ready to be towed across said lake. They allege that defendants agreed to pay them 10 cents per 1,000 feet for such picking up; that they have completed the work, and have not been paid. The declaration also contains a claim for $5,000, based upon the common counts in *assumpsit*. The plea is the general issue, with notice of recoupment.

Upon the first contract the testimony upon the part of the plaintiffs tended to show that the first year they performed their contract, substantially, and that defendants settled up with them, finding no fault at any time with the manner of their performance; that, when they were

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ready to commence again, in the fall of 1886, and went to defendants for supplies, they were informed by one of the defendants, Andrew W. Comstock, that they could not cut another stick of timber upon the lands,—he calling up a clerk to witness that he forbade their going on with the job. They waited until about December 1, 1886, when they took another job, upon which they lost money. There was left when they quit, upon the contract, about 4,000,000 feet of timber uncut. The defendants' measure showed 3,900,000. The plaintiffs testified that they could have put this timber in at $2 per 1,000, or at a profit of $1 per 1,000.

The defendants claim that plaintiffs did not properly perform their contract, in the following respects: Did not bank all the logs upon the Lockwood landing; did not cut the timber clean as they went; did not place all the logs on skids, and left over 3,000 logs in the woods, cut but not hauled, some being on skids, and some on the ground; that, by reason of the timber not being cut clean, the fire got in and damaged it, and that the same fire burned up and destroyed a large number of the logs left in the woods, and damaged those that were not destroyed. The defendants denied that they ever refused to let the plaintiffs go on with the job, and testify that, December 24, 1886, they served a written notice upon plaintiffs to proceed at once, and complete their contract. The plaintiffs admit receiving this notice, but say that they did not receive it until they had taken the other job, and were, therefore, not in a condition to go on with it. The plaintiffs recovered a verdict of $1,560.

The defendants bring error, and claim, first, that, there being 4,000,000 feet of timber upon the lands after the first year's work, the plaintiffs could not have completed the job in less than two years more, as the contract did not authorize them to put in over 3,000,000 in any one

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year; that, as the defendants notified them in December, 1886, to go on with the job, the only damages they could recover would be what they suffered between the time they were forbidden to go on and the date they were notified to proceed; and that, under the most favorable view, they could only get damages for the expenses of one year's delay, and the interest upon the profits of one year's work.

We think the court charged the jury correctly in this respect. He said, in substance, that when plaintiffs were notified to proceed with the contract, as no suit had been commenced at that time, it was their duty to go on with the contract, if they were in a situation to do so, and that, if the jury believed the testimony of the defendants, the plaintiffs were never prevented from going on with the job, they could not recover, in any event. This question was in dispute, and the jury evidently found with the plaintiffs.

The testimony shows that plaintiffs, when this notice was served, had taken another contract, which employed all their teams and means. Under their theory, that up to this time defendants had forbidden their going on with the contract, it was too late for this notice to have any effect whatever upon the rights of the parties. Certainly the defendants could not refuse to furnish supplies, and forbid plaintiffs cutting any timber on the land, and wait until plaintiffs had taken another job, and then withdraw their refusal to permit plaintiffs to finish the contract, and, by a notice to them to go on and perform, force plaintiffs to proceed, or lose all claim for damages thereafter. The plaintiffs had a right to take the refusal as it was given, and to seek other employment upon the strength of it, and they were not obliged to break the other contract they had made in order to save their rights under this one with the defendants. In view of the fact

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that the defendants went on the premises themselves in the winter of 1886 and 1887, and took off 500,000 feet, and let the contract to take off the balance to one Mulvaney, in 1887, at $2.50 per 1,000 feet, we are satisfied that if it be true, as claimed by plaintiffs, that defendants refused to let them go on with the contract until they had taken another job for the winter of 1886 and 1887, plaintiffs were fully justified in treating the contract as broken by the defendants, and were authorized to recover damages for the breach of the same as if no notice to proceed had ever been served upon them.

The claim that the contract had not been fully performed by the plaintiffs the first year was, under the testimony, fairly submitted to the jury. There was a dispute as to the lines of what was known as the "Lockwood Landing." The plaintiffs' testimony showed that a few thousand feet were piled beyond what Comstock claimed to be the line of the landing; the plaintiffs supposing the line extended further up the creek. After Comstock pointed out the line, no more logs were banked above it. If the jury believed this, there was a substantial compliance with the contract in this respect.

Plaintiffs' testimony also showed the timber cut clean, and in a prudent manner. They admitted that a few logs were left in the woods, some of which were not skidded; but this was owing to the fact that the season broke up with a big rain-storm, which, with the piling of logs by defendants upon a pond that plaintiffs' road crossed, prevented their getting all the logs out. Plaintiffs' testimony showed that this piling of logs by the defendants upon this pond, along the sides of their road across it, not only prevented plaintiffs' getting out all the logs they cut, but also from cutting and hauling more. This was denied by defendants; but, if so found by the

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jury, it was a sufficient excuse for not banking all the logs cut.

The evidence upon all the points in which a non-performance of the contract was averred by defendants, coupled with the testimony of plaintiffs that defendants settled with and paid them for the first year's work without finding any fault whatever, and that they never complained of the contract being broken in any way by plaintiffs until they refused to permit further performance by plaintiffs, in September, 1886, was sufficient to go to the jury, and was properly submitted to them. They found against the defendants, and we are not prepared to say they were not warranted in so finding.

The true rule of damages was also laid down by the court. The plaintiffs testified that it cost them $2.10 per 1,000 to put in what they delivered the first year, and that, as part of the work, such as getting camps and roads in order, was done the first year, so as to cheapen the work on the job thereafter, they could have put the balance in for $2 per 1,000. They were therefore entitled, under their testimony, to $1 per 1,000 profit. They did not get 50 cents per 1,000, however, by the verdict; the jury, evidently, taking into consideration the evidence upon the part of defendants, some of which tended to show that there would have been no profit. There is no reason shown in the record why the plaintiffs should not recover, upon a proper showing, the difference between the contract price and the cost of putting in the logs. There is no particular element of uncertainty regarding the profits the plaintiffs would have realized from the performance of the contract. See *Goodrich v. Hubbard*, 51 Mich. 70; *Burrell v. Salt Co.*, 14 Id. 34; *Loud v. Campbell*, 26 Id. 239; *Leonard v. Beaudry*, 68 Id. 312, 80 Id. 163.

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But the court committed error in relation to the picking up of the logs in Hubbard lake. Both parties admitted that there was a contract in relation to this work, but differed as to the compensation to be paid therefor. The plaintiffs claim they were to have 10 cents extra per 1,000; and the defendants testify that they were to pay only 2 cents extra, above the 25 cents for towing, and that they had settled with plaintiffs, and paid them in full, upon that basis. Yet the circuit judge permitted evidence to be given that it was worth 50 cents per 1,000 to pick them up, and instructed the jury as follows:

"The second element in this case is the question in regard to picking up these logs on Hubbard lake. The plaintiffs claim that defendants agreed to give them ten cents a thousand feet extra, over and above the 25 cents that they were to receive for towing. If there was a contract between the defendants and plaintiffs in this case, and they understood it, that the Rayburns were to receive ten cents a thousand for picking up those logs, they were entitled to it, if there was such a contract, and it was understood by all the parties. There could not be any contract unless they did understand each other. But the defendants claim that the contract was different. The defendants claim that the plaintiffs agreed to pick them up for two cents extra. If that was the contract, and the parties understood it, then they were bound by that, because, when they make their contracts, they are bound by them. It does not make any difference how hard it is for one side, or good for the other, when we enter into contracts; if we do enter into them, we are bound by them. So that here are two separate claims as to the contract,—one for two cents, and one for ten cents. You are to judge. You have heard the testimony as to whether there was any contract at all, and, if so, which of these parties is right. If it was for two cents per thousand feet, then the Rayburns will have to be satisfied with that; and it seems, from the evidence, that they have received that. If it was ten cents per thousand feet, then they are entitled to receive it; and, if they have not received it, then they are entitled to receive it at your hands in this suit. But, if you find

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that these parties did not agree on anything, or, if they did talk about it, they were both mistaken when they quit, and their minds did not meet upon this question, then there was no contract at all, because it takes as many as two parties to make a contract, and their minds must meet. If you should find that there wasn't any contract, and the work was done,—and that is admitted, —in that case the Rayburns would be entitled to receive whatever, in your judgment, the work was reasonably worth, because, when we work for a man, and there is no agreement as to what we shall receive, the law gives us what it is worth."

There was no ground in the evidence from which the jury might infer that there was no contract; that the minds of the parties did not meet. There was, undoubtedly, a parol arrangement as to the picking up of these logs; and the only question for the jury to determine was the price to be paid for the work. There was no misunderstanding about it. Either the defendants agreed to pay ten cents or two cents. The burden of proof was upon plaintiffs to show that the price was ten cents. Failing in this, they could not recover, as they had been paid the two cents. As there is no way of ascertaining what conclusion the jury arrived at as to this matter, the judgment must be reversed and a new trial granted, with costs of this Court to defendants.

The other Justices concurred.

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ROBERT RAYBURN AND FRED W. RAYBURN v. ANDREW W. COMSTOCK ET AL.

[Case No. 2.]

Contract—Parties—Substitution—Consideration—Extension of time.

A logging contractor having failed in the *full* performance of his contract, by mutual agreement all claim for damages was waived, and the time of performance extended into another winter, the land-owners reserving the right to fix the time of removal of the timber on *one* of the sections designated in the contract. After this, and before the contractor had commenced work under the new agreement, third persons were induced to take it off his hands, and he was released upon their agreement to perform his agreements, which action is held to amount to a new contract with them, based upon the terms of the old contracts, and for which there was a sufficient consideration.

Error to Alpena. (Simpson, J., presiding.) Argued April 23, 1890. Decided May 2, 1890.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

Turnbull & Dafoe, for appellants.

Depew & Rutherford and *George H. Sleator,* for plaintiffs.

LONG, J. This is an action of *assumpsit,* brought in the circuit court for Alpena county, to recover damages which plaintiffs claim by reason of the defendants not permitting them to perform a certain contract. On the trial, plaintiffs had verdict and judgment. Defendants bring error.

The contract under which plaintiffs claim grew out of the following contract between the defendants and one Thomas G. Spratt:

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"It is agreed between Bewick, Comstock & Co. and Thomas G. Spratt, all of Alpena, M., this thirteenth day of September as follows:

"The said Spratt shall go on the lands of Bewick, Comstock & Co., on the east side of what is known as the 'Sheridan Road,' on sections 17 and 20, and on the S. ½ of N. W. ¼, and N. E. ¼ of S. W. ¼, of 16, and cut, haul, and deliver all of said timber into the limits of the T. B. R. Boom Co., for the sum of $2.75 per M. feet; and also on section 21, and deliver as above all the timber owned by said company, for the sum of $4.00 per M. feet. From two to three million feet of said timber to be delivered in the spring of 1883, as early as the water will permit, and the balance the following year, as early as possible, the timber to be put in the first year under this contract is that on sections 17 and 20, estimated at 1,500 M. feet, and the balance from section 21, to make up the amount to be delivered the first year, cutting first that which has been killed by fire

"The payments for putting in said timber the first year to be made as follows: A cash advance of $800.00 to be made on Oct. 15; supplies to the amount of $1,000.00 during the winter; money in the spring, April 1, to pay the men employed in putting in said logs, not, however, to exceed the amount due under the contract; 25 cents per M. when said logs are all out of what is known as the 'Buff Creek,' and 25 cents per M. when said logs are all delivered into the south branch of Thunder Bay river, if said amount is due under the contract. Any balance that may be due to be paid when said logs, or the main body of them, are delivered in the T. B. R. Boom Co.'s limits as they now exist. Reserving enough money in the hands of Bewick, Comstock & Co. to pay the value of any scattering logs, if the drive is not brought down clean. Said logs to be scaled by a party to be mutually agreed upon. Each party to pay one-half of said scaler's wages, and the second party to board the scaler. The terms of payment for the two years' operating shall be the same relative time as the first year, unless varied by written consent. Interest at the rate of 7 per cent. shall be charged and received on the cash advances until April 1 of the following year.

"All of the above is agreed to by the said Bewick, Comstock & Co., who agree to fulfill their part of this contract as is specified by them as written above. Boom

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sticks to be furnished by the first party, free of cost, to raft the logs over Hubbard lake. The second party at the expense of getting them from where they may be in the lake.

BEWICK, COMSTOCK & Co.
"THOMAS G. SPRATT.

"*Alpena, Sept.* 13, 1882."

It seems that Mr. Spratt was unable to fulfill the above contract within the time limited therein, and the same was extended by the following writing indorsed thereon:

"Whereas, it is now estimated by Thos. G. Spratt that there is at this time about four million feet of timber left on the land described under this contract, and it being rather more than said Spratt wants to put in the present winter, it is therefore mutually agreed that said Spratt may leave all the Norway timber on section 21 that he does not wish to put in, using caution to leave it in such shape as it will be in the least danger from fire, also to be left in a compact body. All timber that is left to be put in in the winter of 1884–85.

"BEWICK, COMSTOCK & Co.

"*December* 1, 1883."

Subsequently the following indorsement was also made on this contract:

"ALPENA, Oct. 8, 1884.

"Whereas, the conditions of this contract have been broken by said Spratt, party to said contract, and, for the purpose of a settlement of all broken and disputed matters, the said Spratt agrees that he will, or cause to be, put in the present winter of 1884 and 1885, all the pine timber on section 16 described in the within contract, and that he shall have the privilege of putting in the timber on section 21, mentioned within, when Bewick, Comstock & Co. decide to have it put in, at the price mentioned in the within contract.

"BEWICK, COMSTOCK & Co.
"THOMAS G. SPRATT."

The foregoing contract was assigned to the plaintiffs in this suit by the following writing:

"For a valuable consideration, we hereby agree to per-

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form and complete all of the within contract as, by the terms thereof, said Thos. G. Spratt was required to do by Bewick, Comstock & Co.

"ROBERT RAYBURN & SON.

"*Alpena, Nov.* 6, 1884."

The plaintiffs claim that the defendants agreed to this substitution, and they consented to take Mr. Spratt's place in performing the Spratt contract, and that Spratt was released from any further obligations thereunder by the defendants; that is, that the defendants, Spratt, and plaintiffs mutually agreed with each other that plaintiffs should perform all that Spratt was to perform under the indorsement of October 8, 1884, above set forth, and to have and receive whatever Spratt would have received if the work had been performed by him, and Spratt to be released; that they were then advised by the defendants that they wanted all the timber on section 16 put in that winter, and that, in the winter following the making of the contract, they did put in all the timber on 16, for which defendants paid them in full; that in March, 1885, and after the timber on 16 had all been put in, and defendants had paid for that, they had a talk with defendants about putting in that on 21 during that spring, and were told that they could not put it in that spring, but in another year they might do so. The reason given by the defendants at this time for not having it put in that spring was that it would run largely to Norway, and that Norway was not worth enough to make it pay.

Plaintiffs further claim that, in the spring of 1885, after getting through cutting and hauling from section 16, they left all their rigging and sleighs there in the camp, preparatory to the work on section 21 the following year; that, in September following, they again talked with defendants, and were told that the defendant William Comstock was going up there, to the land, in a little

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while, and on his return they would let them know whether they would have the timber put in or not. It appears that shortly after this the defendants let the contract for cutting and putting in this timber on 21 to Oliver Fitzpatrick, without any further consultation with plaintiffs, and without their consent. Plaintiffs also gave testimony tending to show the cost of putting this timber in, and the profits which would have accrued to them if they had been permitted to fulfill the contract.

The defendants claimed that the plaintiffs did not fully remove the timber from 16.

The trial court submitted the questions in issue between the parties as follows:

"Now, the defendants in this case claim that, even if you should find that the Rayburns were substituted in the place of Spratt, and that the defendants were bound to them upon this agreement, the defendants claim here that the Rayburns did not take the timber all off from section 16. Now, gentlemen of the jury, these contracts bound Spratt to take the timber off from section 16, and bound him to take the timber off from section 21; and, if the Rayburns were substituted in his place, it bound the Rayburns to take off that timber clean from section 16, and also off from 21; and there is nothing in this case that shows that they were prevented from taking the timber off from section 16, and if they did not do that they violated the contract, and in that case they could not recover in this action, if they did neglect to take the timber off. But, whether they did, or whether they fulfilled as to section 16, it is a question for you to find from the evidence. You have heard the evidence in this case as to that part, and, if they failed to take the timber off from section 16 as the contract required, —there is nothing in this case that prevented them from doing it,—then they violated their contract; and, if they violated this contract in the least, where they have had an opportunity, they cannot hold the Comstocks to fulfill any part of it, because, as I have stated before, in order to recover, they must show that they have fulfilled everything, or were prevented by the Comstocks' refusing to let them do it.

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"The plaintiffs claim that they have fulfilled the contract as far as they were permitted to do it, and, whether they have done that or not, that you will have to find. If you find that they have, then they claim that, when they went to take the timber off from 21, the Comstocks refused to let them do it. That is, they claim this: The Comstocks were not obliged to let them take the timber off from section 21 until they deemed it necessary. That contract leaves it optional with the Comstocks. It simply gives Spratt the privilege to take it off when the Comstocks want it taken off. And, if the Rayburns were placed in Spratt's place, then the Comstocks were only bound to let the Rayburns take it off when they considered it necessary to take it off, or whenever, as the contract says, they decide to have it taken off.

"Now, if Rayburn & Son were in Spratt's place, and had fulfilled everything up to that time on their part, it was a privilege that they had a right to assert, that, when the Comstocks reached the conclusion, and decided to have that timber taken off, it was their privilege and right to take it off, under this contract, if they were in the place of Spratt. It was Spratt's right, if he had stayed in; and, if he had passed it over to the Rayburns, and the Comstocks consented to it, then it was their right. And when the Comstocks decided to take it off, as it seems from the evidence that they did, because they let the contract to somebody else, then I say it was their duty to have let the Rayburns do it, if they desired to; and, if they refused to let them do it, in that case the defendants broke their contract with the Rayburns; and, when a man breaks his contract, he must pay whatever damage the other party receives by virtue of the breach."

On the question of damages the court instructed the jury that plaintiffs, if they were entitled to recover at all, would be entitled to the difference between the cost of taking the timber off and the contract price.

At the request of counsel for the defendants, the court submitted three special questions to the jury as follows:

"*Q.* Did the plaintiffs and defendants and Spratt ever get together, and agree that the plaintiffs should be substituted in this contract in place of Spratt, each one of these parties understanding it in this way?

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"*A.* Yes.
"*Q.* Did the defendants refuse to release Spratt from this contract?
"*A.* No.
"*Q.* Did the defendants ever agree to release Spratt from this contract?
"*A.* Yes."

The contention in this Court by counsel for defendants is—

1. That the indorsement on the contract dated October 8, 1884, is void for want of consideration.
2. That, by the indorsement in reference to section 21, Spratt did not agree to put the timber in, so that is void for want of mutuality.[1]
3. That, by this indorsement in reference to section 21, Spratt only had the privilege of putting this timber in when defendants decided to have it put in, at the price mentioned in the original contract.
4. That this contract of indorsement only had this legal effect: That, if Spratt put this timber in, he should be paid the price mentioned in the original contract.

Under the first point, defendants' counsel claim that, at the time of making this indorsement, Spratt was liable to the defendants for non-performance of this contract, and that all his rights thereunder were at an end; that defendants could have put the timber in, and compelled him to pay all damages; that Spratt, by this new arrangement of that date, merely agreed to do what he ought to have done before, and what he was bound to do; and that, if it be conceded that Spratt, by this indorsement, bound himself to put the timber in on 21 when defendants desired it, the same was not binding on defendants, as there was no consideration for the waiver or extension of time.[2] There would be much force in this claim if the new arrangement made between defendants and Spratt on

[1] Citing *McDonald v. Bewick*, 51 Mich. 79, 80; *Wilkinson v. Heavenrich*, 58 Id. 574.

[2] Counsel cited Add. Cont. § 85.

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October 8, 1884, was simply to carry out the terms of the old contract, and to perform thereunder within the time limited therein. But by the new agreement of that date the time was extended into the winter of 1884 and 1885; the defendants reserving to themselves the right to fix the time of removal of that on 21. The defendants by this new arrangement also settled with Spratt for all damages which might have accrued to them by Spratt's failure to perform his first contract.

This was the situation of affairs when the plaintiffs were called upon by the defendants to take the Spratt contract off his hands. Plaintiffs at that time were under no obligation to the defendants, and were in no way interested in the performance of this contract. They found defendants and Spratt with this contract between them, and which it was conceded, by the writing indorsed, Spratt had failed to perform. They also learned from the writing that the defendants had absolved Spratt from all damages for its breach, and that defendants were willing that Spratt should go on and put in the timber from 16, which he had failed to do under the original contract, but that it was conditioned under that new agreement that, if he would do so, he had the right to put in that on 21 whenever the defendants should determine to have it lumbered. With this understanding, the plaintiffs were induced to take the contract off Spratt's hands. The jury have found that Spratt was released by this arrangement.

It is true that if one promises to perform a certain undertaking at a specified price, and while this contract is still in force a subsequent promise is made to pay him a larger price for the performance of the same thing, it would be a mere gratuitous undertaking or a promise to pay for doing that which he is already bound to do. But where the old contract is rescinded, and the parties

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are discharged from their obligations under it, or all damages released by reason of its non-performance, the parties may make a new and valid agreement, though such agreement may relate to the subject-matter of the old contract, which has been set aside and discarded. Be this as it may, the circumstances of this case take it without the rule claimed by defendants' counsel. It does not rest entirely upon the rights of Mr. Spratt, under these contracts. The parties agreed to the release of Spratt, and a new contract was entered into between defendants and the plaintiffs. The basis of this contract was fixed by the terms of the old contracts; that is, that plaintiffs should go on and put in the lumber on 16, and, whenever the defendants were ready to lumber on 21, they might have the privilege of putting this in at $4 per 1,000. This was a sufficient consideration.

The other questions raised have as little force. By agreement of all the parties, the plaintiffs were made parties to the contract. At this time the timber was standing on 16 and 21, that on 16 to be cut the coming winter. Plaintiffs cut and put in all on section 16, according to the terms of the contract. The defendants settled up and paid for this part as agreed, and then promised the plaintiffs that they might put that in on 21 during the next year. Acting upon this understanding, the plaintiffs left their sleighs and camp equipage on 16, ready for use the following season, as section 21 was immediately adjoining this section. In the face of this agreement, the defendants, without further notice to the plaintiffs, let the contract on 21 to other parties.

The contract was not void for want of mutuality. The disputed facts in the case were fairly submitted to the jury, and they found the facts as claimed by plaintiffs.

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The rule of damages laid down by the court was the proper one.

The judgment must be affirmed, with costs.

The other Justices concurred.

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JOHN KOELEG AND MARY KOELEG v. WILLIAM H. PHELPS ET AL.

Landlord and tenant—Lease—Breach of covenant.

The lease in this case is construed as only giving the lessor the right of re-entry, and possession of the stock and farming tools and utensils rented with the farm, in case the lessee failed to work the farm in a good and workman-like manner, and not to authorize the seizure of the crops for such breach.

Error to Alpena. (Simpson, J., presiding.) Argued April 23, 1890. Decided May 2, 1890.

Replevin. Defendants bring error. Affirmed. The facts are stated in the opinion.

Shields & McNamara, for appellants.

Turnbull & Dafoe, for plaintiffs.

MORSE, J. This is an action of replevin. The plaintiffs, April 30, 1887, rented of the defendant Phelps a farm, situated in the township of Maple Ridge, county of Alpena, for the term of three years from May 1, 1887. The contract was in writing, and of considerable length. Phelps was to furnish one-half of the seed, and the farming tools and utensils then on the place, and the use of

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a team during the summer season. The plaintiffs were to do the work in a good and workman-like manner at all times, and give time and attention thereto, and furnish one-half the seed. The crops were to be divided equally, at the farm, at the end of each season. The agreement also provided that,—

"In case said Phelps furnishes said second party in provisions, seed, etc., said Phelps is to have a lien in the nature and to the effect of a chattel mortgage, as security therefor, upon the crops and stock."

He was also to have a lien as of a chattel mortgage upon all the produce, whether harvested or not, to secure the payment of rent and taxes.

At the close of the first season, and about October 17, 1887, Phelps took possession of the farm, served a notice to quit upon plaintiffs, ordered them to leave the place, and left a man on the premises to prevent plaintiffs from taking away any of the crops, which were harvested, and consisted of oats, wheat, and hay. The defendant Phelps took possession of the farm, and excluded the plaintiffs from the crops, upon two grounds:

1. That they were indebted to him largely for advances made by him, and for which he had a lien upon the crops.
2. That the plaintiffs had not conducted the farm in a good and workman-like manner.

Phelps advertised the property for sale under his alleged lien. On the day of the sale, and before it was made, Mr. Dafoe, on behalf of the plaintiffs, tendered Phelps the sum of $125, in full of his said lien, which Phelps refused. Thereupon the plaintiffs replevied the property, but, under the writ, obtained possession of less than their half of each of the crops harvested by them.

The following special questions were submitted to the jury:

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"1. Did the plaintiffs conduct the farm in a good and workman-like manner?"

The jury answered: "Cannot decide from the evidence given.

"2. At the time Phelps took possession, did the plaintiffs owe him more than $125?

"*A.* No."

The general verdict was for the plaintiffs. The defendant Phelps in due time moved for judgment upon the answer of the jury to the first special question. This was denied, and judgment entered for the plaintiffs in accordance with the general verdict.

It is claimed by defendants' counsel that if the plaintiffs had not conducted the farm in a good and workman-like manner Phelps was authorized not only to take possession or the premises, but also of the property upon it. This was the view of the circuit judge, and he so instructed the jury. Defendants' counsel contend that as the right to the property in this action depended upon the right of possession at the time the writ was brought, and the defendant Phelps having taken such possession, the burden of proof was upon the plaintiffs to show that they had conducted the farm in a good and workman-like manner. We think the circuit judge was in error in ruling that Phelps was authorized, under the contract, to take possession of the crops if the plaintiffs had not managed the farm in a good and workman-like manner. The lease cannot be so construed. Under the contract, Phelps was to furnish the following property: 30 sheep, 8 chickens, 4 turkeys, 1 cow, 4 head of young cattle, 1 sow, and 4 pigs. This stock was to be kept and cared for by the plaintiffs, and returned to Phelps at the end of the three years, together with one-half of the increase. The contract provided as follows:

"And should the said parties of the second part fail in any of the foregoing promises, conditions, and obligations,

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contained in this agreement, on their part to be fulfilled, kept, and performed, then this lease will become null and void; and the said party of the first part, his heirs, executors, administrators, and assigns, may peaceably re-enter and take possession of the premises and property hereby rented, without any formal proceedings, either at law or in equity; and the said parties of the second part hereby agree to pay to the said party of the first part, his heirs, executors, administrators, or assigns, all damages or loss which he, they, or them may suffer by reason of any failure on the part of the parties of the second part faithfully to carry out, observe, and perform all the terms, covenants, and conditions hereinbefore set forth."

In case the plaintiffs did not work the farm in a good and workman-like manner, Phelps was authorized to take possession of the premises "and property hereby rented." This property must be considered to be the farming tools and utensils, and the stock put on the place by Phelps, not the share of the crops put in and harvested by plaintiffs. There is no authority given in the instrument to Phelps to have possession of or hold the plaintiffs' share of the crops for any purpose save the payment of his lien, or for the non-payment of rent or taxes. The jury found that his lien was tendered him; and he made no claim on the trial for the non-payment of rent or taxes. As the writ was issued only for crops—hay, oats, and wheat—raised upon the premises the first year, the special finding of the jury as to the farm management was entirely immaterial. The other defendants were persons who purchased the property at Phelp's sale, and derived their title from and held under him.

We find no error in the proceedings upon the trial, and the judgment will be affirmed, with costs.

The other Justices concurred.

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CHARLES NITZ v. HENRY BOLTON AND DONALD MCRAE.

[See 71 Mich. 388.]

Replevin—Manner of return—Judgment.

This is an action of replevin for saw-logs, a portion of which were cut from lands owned by the defendants, and upon which they placed their mark, but made no claim to the remainder of the logs, and exercised no acts of ownership over them; and it is held that the only question to be submitted to the jury was the amount of the logs taken belonging to the defendants, and their value, they having waived a return.

Error to Iosco. (Simpson, J.) Argued April 23, 1890. Decided May 2, 1890.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion, and in 71 Mich. 388.

Turnbull & Dafoe, for appellant.

R. J. Kelley, for defendants.

GRANT, J. The record in this case is very imperfect. It contains no evidence on the part of the plaintiff showing any possession of the defendants at the time the writ was issued.

Plaintiff trespassed upon the lands of the defendants, and cut the pine timber therefrom; and this Court held in 71 Mich. 388, that under the circumstances the plaintiff could not be considered as having acted in good faith. Defendant Bolton testified that, when he learned of the trespass, he took an inspector, Mr. Burthwick, with him, and went over the land, and found some of the logs on the skidways; that Burthwick scaled these logs, and made the amount to be 72,000 feet; that they marked them,

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with defendants' mark, H; that he told plaintiff there were probably from 130,000 to 150,000 feet upon their land, but that he took no possession, and made no claim to any particular quantity until after Burthwick's scale, and then only claimed the amount as measured and estimated by Burthwick; that the defendants never had any other possession of the logs than that of marking the 72,000 feet found on the skids; and that the remainder of the logs taken from defendants' land had been drawn to the creek by the plaintiff, and banked in the stream.

The above constitutes the whole evidence of any possession of or claim to the logs in controversy. Burthwick testified that by examining the skidways of logs he determined that there were about 38,288 feet more of logs which had been taken from defendants' land, making in all about 110,425 feet. The record does not show that defendants ever exercised any act of possession over any of the logs owned by plaintiff, nor that they ever made any claim to any other than those which belonged to them.

The plaintiff took, by virtue of his writ of replevin, 130,000 feet, and now alleges as error that the circuit judge refused to instruct the jury to find how many of the logs so taken belonged to plaintiff, and how many to defendants. Defendants waived return of the property, and asked a verdict for the value. Under this record, the only question that could properly be submitted to the jury, was the amount of the logs taken belonging to defendants, and their value. This question was submitted to the jury, with proper instructions.

Judgment affirmed, with costs.

The other Justices concurred.

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ELIZA WILSON v. THE ESTATE OF HELEN WILSON, DECEASED.

Married woman—Bond—Evidence—Matters equally within knowledge of deceased person.

1. A married woman is liable upon a joint and several bond, signed by herself and husband, given as security for money borrowed *by her*, and used in building a house upon *her* land.
2. This Court has gone no further than to hold that it is not sufficient to warrant a recovery against the wife upon the joint obligation of herself and husband to simply show that the materials for which the obligation was given went to improve her separate property; citing *Emery v. Lord*, 26 Mich. 431.
3. The testimony of a daughter of a claimant against the estate of a deceased person, as to admissions made by the deceased, is not incompetent under How. Stat. § 7545, prohibiting the opposite party from testifying to matters which, if true, must have been equally within the knowledge of the deceased.

Error to Wayne. (Brevoort, J.) Submitted on briefs April 23, 1890. Decided May 2, 1890.

Appeal from allowance of an account by commissioners on claims. Judgment of circuit court, in favor of claimant, affirmed. The facts are stated in the opinion.

Thomas Hislop, for appellant, contended:

1. The court should have directed a verdict for the estate, for the reason that the claimant was bound not only to make out a *prima facie* case, but to prove the liability of the deceased on the bond, which she has failed to do.
2. When a husband and wife unite in a bond or note, and there is no evidence as to whom the money was paid or the consideration moved, or to whom the credit was given, as in this case, there is no presumption against the wife, and she must be considered a surety only, and the husband's property is the primary fund for the payment; citing *Bayler v. Com.*, 40 Penn. St. 37; *Vartie v. Underwood*, 18 Barb. 561; *McCausland v. King*, 60 Mich. 70; *Ins. Co v. Bank*, 68 Id. 116.

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E. H. Sellers, for claimant, contended for the doctrine stated in the opinion.

GRANT, J. The commissioners, appointed by the probate court to hear and determine claims against the estate of Helen Wilson, deceased, allowed the claim of Eliza Wilson for $1,624.58. The administrator appealed from this allowance to the circuit court. The case was tried in that court before a jury, resulting in a verdict and judgment in favor of the claimant. The administrator brings the case into this Court by writ of error.

Plaintiff introduced in evidence a bond dated May 1, 1875, executed by George Wilson and Nellie Wilson, the deceased, for the sum of $1,400, with interest at 7 per cent., and running to Henry and Eliza Wilson. Henry Wilson assigned all his interest in the bond to Eliza. Annual payments of interest were indorsed on the bond to and including the year 1885. George and Helen Wilson were husband and wife at the time the bond was executed. It is claimed that this money was obtained by Helen for her sole benefit, and was used in erecting a house upon land of which she was the owner in fee. It is conceded that she owned the land, and there is no doubt but that about that time she erected the house upon the land.

Mrs. Martha Harris, the daughter of Henry and Eliza Wilson, testified, under objection, that Helen Wilson told her, shortly before the erection of the house, that she was going to borrow the money from her father and mother. Her testimony was competent. It was not within the inhibition of How. Stat. § 7545, prohibiting the opposite party from testifying to matters which, if true, must have been equally within the knowledge of a deceased party, in a suit prosecuted or defended by the heirs, assigns, legatees, or personal representatives of such

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deceased person. Another witness, by the name of Adams, who was not related to any of the parties, testified that Helen Wilson told him that she obtained the money with which to build the house from her husband's parents, Henry and Eliza Wilson.

This was, in substance, all the testimony on the part of plaintiff. The defendant introduced no evidence. The court thereupon charged the jury that, if they were not convinced that Mrs. Harris and Mr. Adams told the truth, then the plaintiff could not recover; that if they were satisfied that deceased borrowed the money, and that it was used for the benefit of her estate, then the plaintiff was entitled to recover, notwithstanding the fact that deceased was a married woman, and that she and her husband signed the bond; but that, if she and her husband jointly borrowed the money, their verdict must be for the defendant.

The circuit court correctly charged the jury, and it is difficult to conceive how the charge could have been more favorable to defendant, or how the jury could honestly have reached any other conclusion. The only evidence in the case bearing upon the question was that she borrowed the money, and that it was used for her sole benefit. Under these circumstances, she was liable. The facts are entirely different from those in *Reed v. Buys*, 44 Mich. 81. In that case the sole defense was that the note was not given for any purpose relating to her own property or interest, and it appeared conclusively that such was the case. In the case at bar it appears equally conclusive that the bond was given for purposes relating to her own property. But at all events, the jury have so found, and that is conclusive upon us.

The position taken by counsel for defendant, that, inasmuch as George Wilson became in law liable upon the bond, his wife was not liable, although she borrowed

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the money for use upon her own separate estate, is unsound, and unsupported by authority. None of the cases cited hint at any such doctrine. This Court has gone no further than to hold that it is not sufficient to warrant a recovery against the wife upon their joint obligation to show only that the materials for which their joint obligation was given went to improve her separate property. *Emery v. Lord*, 26 Mich. 431. It will appear from the statement of the charge above given that the trial judge recognized this distinction when he told the jury that they must be satisfied that she (Mrs. Wilson) borrowed the money.

The judgment is affirmed, with costs.

The other Justices concurred.

WILLIAM MUELLER ET AL. v. COLUMBUS J. PROVO.

Chattel mortgages—Bill of sale intended as security—Consideration—Execution—Replevin—Waiver of return—Judgment.

1. Where a bill of sale (intended as security) is given for a specified consideration, and nothing appears upon its face to indicate that it is intended to secure any other or greater sum, the creditors of the mortgagor (vendor) are entitled to treat it as valid only to the amount specified; citing Jones, Chat. Mortg. § 79; Jones, Mortg. § 857.

   So *held*, where, in replevin by a vendee claiming under such a bill of sale from the sheriff, who had levied upon the property at the suit of a creditor of the vendor, the court instructed the jury that the bill of sale was given to secure an indebtedness of $3,000, being the named consideration, while the undisputed testimony showed that it was given to secure advances *then* made to the amount of $7,000.

2. An assertion of a mortgage lien, after the payment of the

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mortgage debt, is a fraud upon the creditors of the mortgagor, who may levy upon the property, and the mortgagees cannot maintain replevin against the officer.

3. In replevin the appraised value of the property is not conclusive, and is accepted only in the absence of more satisfactory evidence; but the Court will conclude, from the failure of the plaintiffs to contest such valuation, that they are satisfied with it.

4. In replevin from a sheriff of property seized on execution, he may elect to waive a return, and may take judgment for the amount of his lien, which is established by the judgment. The acceptance of a verdict for the value of the lien, and causing judgment to be entered thereon, is sufficient evidence of such election.

5. The Court distinguished this case from *Frederick v. Circuit Judge*, 52 Mich. 529. In that case the sheriff held the goods under an attachment, and at the time of the trial of the replevin suit no judgment had been rendered in the attachment suit.

Error to Delta. (Grant, J.) Argued April 23, 1890. Decided May 2, 1890.

Replevin. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

F. D. Mead (*E. C. Chapin*, of counsel), for appellants.

Ball & Hanscom, for defendant.

[The points of counsel are stated in the opinion.—REPORTER.]

CAHILL, J. The plaintiffs in this suit, who were doing business as timber merchants in Chicago, brought an action of replevin in the circuit court for Delta county on June 1, 1888, to recover a quantity of cedar ties, posts, poles, and logs.

The defendant was the sheriff of Delta county, and had possession of the cedar under two executions against Frederick M. Olmsted, issued upon judgments rendered

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in the Delta circuit; one in favor of William J. Quan & Co. for $1,772.33 damages, and $106.05 costs, and one in favor of Gray, Kingman & Collins for $2,009.40, and $20 costs. The executions were issued May 25, 1888, and levied upon the property in question, May 31, and the main question in the case is whether the defendant had a right to levy upon this property, and realize from it the amount of these executions. The facts necessary to be stated are as follows:

On October 26, 1886, the plaintiffs made an agreement with Olmsted, the execution debtor, by which he was to get out and deliver to the plaintiffs at Milwaukee, Racine, or Chicago a quantity of cedar ties and posts, for which they were to pay him an agreed price. The plaintiffs were to make advances to Olmsted in money and supplies during the progress of the work, and Olmsted agreed to give plaintiffs a bill of sale of the cedar as fast as it should be banked, if the plaintiffs should ask it. Olmsted also ageed to give to the plaintiffs a mortgage on all his goods, including those he had on hand at the date of making the agreement and those he was then shipping down, as further security for the advances made to him. Work under this arrangement was begun in the fall of 1886 and prosecuted through the winter and spring of 1887.

On July 20, 1887, Olmsted owed the plaintiffs a balance of $7,751.50, and on that day Mr. Christy, of the plaintiffs' firm, went to Escanaba, and took a bill of sale of the cedar then on hand. The consideration named in this bill of sale was $3,000, and we are satisfied that it was intended as security, and was not intended to pass the title to the cedar. On the same day, Olmsted executed to the plaintiffs a chattel mortgage, covering the property in two supply stores, certain teams, wagons, etc., as additional security for the advances so made to him by the plaintiffs. The chattel mortgage is not set out in

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the record, and we are not informed as to the exact amount which it secured, nor as to its terms and conditions. It is stated generally that it was given as additional security. Olmsted, who was called by the plaintiffs, testified that the property covered by the chattel mortgage was worth about $4,600. At the time the bill of sale was given, the cedar was in different townships in Delta county, and had not been run down the streams. The exact amount of it does not appear to have been known to either Olmsted or the plaintiffs.

In September following, Olmsted began operations again, and prosecuted them through October, and until about November 25. During this time he had gotten out a considerable quantity of cedar, but the exact amount of this does not appear. During the summer of 1887, and after the bill of sale was given, he shipped to the plaintiffs at Chicago cedar to the amount of $3,000. This was testified to by Olmsted, and not disputed. On November 25 Olmsted made a new contract with the plaintiffs to work for them by the month. The plaintiffs were to furnish money and supplies as needed, as before, and Olmsted was to get out and deliver cedar of the same general description and quality as before. Under this arrangement the plaintiffs advanced to him $6,146.25, and Olmsted got out a large quantity of cedar ties and posts, the exact amount of which does not not appear.

From the facts so far stated it will appear that there were three classes of cedar gotten out by Olmsted:

1. That gotten out prior to July 20, 1887, and on which he gave plaintiffs a bill of sale.
2. That gotten out between July 20 and November 25, 1887, which, under the contract of October 26, 1886, clearly belonged to Olmsted, and on which the plaintiffs had no lien.
3. That gotten out after November 25, 1887, which belonged to the plaintiffs.

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That gotten out prior to November 25 is called in the record the "old cedar," and that gotten out after that date the "new cedar." When the execution levies were made the old and the new cedar was all mixed up. It was mixed up in the woods before it came down in the river, and it was mixed up in the river. At the time of the levy it was lying in the booms at the mouth of the Rapid river, all jammed together. It was all marked alike "F. O.," and there was no way to distinguish the old from the new cedar. The sheriff levied upon all of it. Before beginning this suit, Mr. F. D. Mead, as attorney for the plaintiffs, demanded all this property of the sheriff, who refused to deliver it. This action was then brought.

The bill of exceptions contains all the testimony. It does not appear that the plaintiffs attempted to make a clear statement of their account with Olmsted upon the trial. What information is found in the record was drawn out of Mr. Henry A. Christy, the only one of the plaintiffs who was sworn, by a rigid cross-examination.

The jury rendered a special verdict, in substance as follows:

1. That the defendant did not unlawfully detain the property.
2. That the bill of sale given by Olmsted to the plaintiffs, under which they claimed the right to the possession of the property, was fully satisfied and paid to the plaintiffs before the commencement of this suit.
3. That so much of the property replevied as was manufactured and gotten out by Olmsted prior to November 25, 1887, was of the value of $4,057.51, and that the defendant had a special property in the same to the amount of $4,057.51 by virtue of his writs of execution.

The defendant having waived a return of the property, a judgment was rendered allowing him to recover against the plaintiffs the sum of $4,057.51; that being the amount

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of his special property in the goods and chattels manufactured and gotten out previous to November 25, 1887.

This judgment is brought to this Court by the plaintiffs by writ of error, and the following points are made against its validity:

First. It is alleged that the circuit judge erred in instructing the jury that the bill of sale given July 20, 1887, was to secure an indebtedness of $3,000, and it is claimed that there was no testimony in the case upon which to base such a charge; that the undisputed testimony of Mr. Christy showed that the bill of sale was given to secure advances made under the contract of October 26, 1886, amounting at the time the bill of sale was given to over $7,000.

This view is based upon the idea that the consideration named in the bill of sale is not conclusive, but that the plaintiffs were at liberty to show the actual demand which the instrument was intended to secure. This would be true if the instrument itself showed that it was intended to secure a larger amount than that named as the consideration, but this rule can only apply to those cases where a discrepancy appears upon the face of the paper between the consideration mentioned at the commencement and the debt described in the later conditions of the instrument. It is possible that, as between the plaintiffs and Olmsted, the bill of sale might have been construed as security for the entire debt due from Olmsted to them; but where, as in this case, the bill of sale is given for a named consideration, and nothing appears upon its face to indicate that it was intended to secure any other or greater sum, the creditors of the mortgagor are entitled to treat the instrument as valid only to the amount specified. Jones, Chat. Mortg. § 79; Jones, Mortg. § 357.

Second. It is claimed that the court erred in instructing the jury that the defendant had a right to levy upon

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the property in question. The instruction of the court was as follows:

"When the sheriff takes property that is mortgaged, the law says that he has the right to take it and sell it, and sell the interest which the mortgagor (which would be Olmsted in this case) has. He sells it subject to the mortgagee's rights; * * * so that, so far as the property that was covered by the bill of sale is concerned, the defendant, Provo, the sheriff, had a right to take and hold it. * * * Now, assuming that mortgage was valid,—not tainted with fraud,—then I told you that the sheriff had a right to levy upon it, and hold possession of it, and that that replevin could not be maintained under those circumstances."

There was no error in this. How. Stat. § 7682. It is claimed that this instruction ignored the plaintiffs' rights—

1. Under their bill of sale, to the cedar cut before July 20, 1887.
2. To their right to the cedar cut after November 25, 1887, as owners of it.

Neither of these positions is correct. Under the statute just cited, the sheriff had an undoubted right to levy upon the cedar cut before November 25, even granting that the plaintiffs' mortgage was in force; but the verdict of the jury shows conclusively that the plaintiffs' mortgage was not in force, but had been paid; and, under those circumstances, for the plaintiffs to assert that the mortgage was in force, and unpaid, was fraudulent as against the execution creditors of Olmsted.

As to the property gotten out after November 25, 1887, the court instructed the jury that the plaintiffs were entitled to recover that. It is claimed that the verdict of the jury ignored this instruction. This we do not find to be the fact. The effect of the verdict was to give the plaintiffs all of the property replevied, which was appraised

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at $10,123, subject only to the payment of the defendant's lien, amounting to $4,057.51. The balance so in their hands would amount to $6,065.49. They had before that received, in cedar shipped prior to January 1, 1888, $11,232.59, making a total of $17,298.08, exclusive of what may have been realized by them from the chattel mortgage, of which no account is given. We have seen that Olmsted valued the property covered by the chattel mortgage at $4,600. It is difficult to ascertain from this record the exact amount of plaintiffs' advances to Olmsted, but it appears that the balance due them January 1, 1888, was $6,146.28. If to this we add the amount of Olmsted's credits, $11,232.59, we have $17,378.87 as the amount which appeared on the plaintiffs' books against Olmsted January 1, 1888. These figures show that there was due the plaintiffs from Olmsted $80.79, and this without taking into consideration what they may have realized out of the property in the supply stores covered by the chattel mortgage.

The only chance for the plaintiffs to have been injured by the result of the verdict in this case, so far as we can make it out from the record, lays in the possible over-valuation of the property replevied by the appraisers under their writ. But the value of the property as found by the appraisers is not conclusive. It is accepted only in the absence of evidence more satisfactory. As the plaintiffs did not contest this valuation, we must conclude they were satisfied with it.

Third. It is objected that the verdict of the jury should have been for a return of the property to the sheriff, and that the judgment for the amount of the sheriff's lien was erroneous. We think the verdict was in harmony with the statute (How. Stat. §§ 8342 and 8351), which reads as follows:

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"SEC. 8342. When either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter; and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

"SEC. 8351. If any goods or chattels which are replevied had been attached, they shall, in case of judgment for a return, be held liable to the attachment, until final judgment in the suit in which they were attached, and for thirty days thereafter, in order to their being taken in execution; and if such final judgment be rendered before the return of the property, or if the property when replevied was seized and held on execution, it shall be held subject to the same attachment or seizure for thirty days after the return, in order that the execution may be served thereon, or the service thereof completed, in like manner as it might have been if such property had not been replevied."

We distinguish this case from that of *Frederick v. Circuit Judge*, 52 Mich. 529. In that case the sheriff had seized the goods under an attachment, and was asking a return of the property.[1] There was no way of determining at that time what the value of his special interest was. No judgment had been obtained, and it was possible that none would be. We do not wish to be understood as holding that the sheriff in this case might not have taken a judgment for a return of the property, but simply that he had a right to waive such return, and take a judgment for the amount of his lien, which was established, if he so elected. It was held by this Court in

[1] The sheriff had waived a return, and taken judgment for the amount of his lien, and a motion was made to vacate this portion of the judgment, and for the entry of a judgment for a return of the property, which was denied, and a *mandamus* was granted to compel the action asked for.

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First Nat'l Bank v. Crowley, 24 Mich. 499, that where property is taken from the possession of the sheriff, who held it under executions, by a plaintiff in replevin without right, the sheriff might take a judgment for the full value of the property. If he could do that, he certainly could take judgment for any amount less than the full value of the property, which should be equal to the amount of his executions. *Moore v. Vrooman*, 32 Mich. 526.

It is objected that the record does not show that the defendant expressly waived a return of the property, and that for this reason the verdict and judgment should be set aside. We think the fact that the defendant accepted a verdict for the value of his liens, and caused judgment to be entered upon such verdict, is sufficient evidence of his election to waive a return.

The judgment must be affirmed, with costs.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. GRANT, J., did not sit.

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THE PEOPLE, EX REL. JOHN BLOMQUIST, v. PETER J. NAPPA ET AL.

Officers—Quo warranto—Religious societies—Election.

1. In the case of an intrusion upon an office, the Court has discretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by such judgment; citing *Vrooman v. Michie*, 69 Mich. 44.
2. It would be quite unseemly, as well as detrimental to the best interests and harmony of religious societies, if courts should interfere with their internal affairs when no property rights are

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involved, simply because the regularity of their proceedings may be open to question by some disaffected party.

So *held*, where a meeting of a religious society for the election of trustees was adjourned by the chairman on his own motion and without right. The meeting dispersed, but several members announced that at two o'clock of the same day it would re-assemble and proceed to the election, and a portion of the members did meet pursuant to such notice, and trustees were elected, who qualified and entered upon the discharge of their duties, and are sought to be ousted on the relation of one who is not shown to have any interest in the action complained of.

Error to Houghton. (Williams, J.) Argued April 23, 1890. Decided May 2, 1890.

Information in the nature of a *quo warranto* to test the title of respondents to the office of trustees of a religious society. Relator brings error. Information quashed. The facts are stated in the opinion.

Allen F. Rees, T. L. Chadbourne, and *A. T. Streeter,* for appellant.

Stone & Gray and *J. B. Humphrey,* for respondents.

CHAMPLIN, C. J. This is an information in the nature of a *quo warranto* to test the title of respondents to the office of trustees of a religious society, organized under chapter 108 of the Compiled Laws of 1871, being sections 4617–4642, inclusive, of How. Stat.

The bill of exceptions contains a statement of facts, which are conceded to be correct, as follows:

"That notice of the annual election of the society for trustees was duly given for Sunday, December 23, 1888, in the church, no hour being named.

"That on that day, at the close of the morning service of the society, and before the congregation had dispersed, the election for trustees was announced by the chairman of the trustees, the officer charged with the duty of presiding thereat,

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pursuant to the usage and custom of the society, in the presence and hearing of the congregation then and there present, which included a large portion of the legal voters of the society.

"That all previous elections of trustees of the society from its organization, which was in January, 1873, had been held pursuant to the same kind of notice given in this case, and in the church, at the close of the morning religious service thereof, and before the congregation had dispersed, on the Sunday nearest Christmas in each year.

"That after said officer had announced in the customary manner that the election would then proceed, some noise and confusion arose among those present, owing to certain statements of the chairman relative to the qualifications of voters at the election; and it was a disputed question whether such noise and confusion were so great as to make it impossible to then hold an election, there being testimony both ways upon this question.

"That said officer presiding over the meeting, after some time, then and there announced, without any motion or vote on the subject, that the election was postponed or adjourned, without naming any adjourned day or time; and that thereupon those present all dispersed and left the church.

"That after said announcement by said officer, and after some, but before any considerable number, of those present had left the church, several of those present, but not said officer, but a trustee among others, announced —which announcement was heard by many persons, and might have been heard by all—that the election would go on, or be held in the afternoon, or at 2 o'clock in the afternoon, but no motion to this effect was made, and no vote taken on the subject.

"That at or about 2 o'clock in the afternoon a number, but not all, those present at the above-detailed proceedings, assembled in the church, and the chairman, the officer aforesaid, who was not then present, was sent for; that, some time between 2 and 3 o'clock in the afternoon, that officer appeared in the church, and, on being requested by those present to go on with the election, refused to do so, again stating that the election was postponed, and went away.

"That said society had no meeting for worship in the afternoon; that. some time between said hours of 2 and 4 o'clock P. M., those remaining and then present in the

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church elected a chairman of the meeting, appointed inspectors, and held an election for trustees, and the respondents were voted for as trustees, and declared elected by authority of the meeting. A portion of those voting for them for that office were legal voters of the church, and there were no votes against them.

"That a considerable number of the legal voters of the society present in the forenoon at the proceedings then had, above described, were not present in the afternoon at the proceedings then had and above described, and some who were present in the afternoon took no part in the proceedings; that the respondents hold, or claim to hold, their offices as trustees by virtue of the above proceedings; that the term of the trustees who were to be elected on said day began January 21, 1889, and ran for three years therefrom.

"The counsel for the said plaintiff thereupon requested the said court in writing to direct the said jury to find a verdict for the plaintiff, which direction the said court then and there refused to give; to which refusal of the court the counsel for the plaintiff then and there duly excepted.

"And the said circuit judge did then and there direct and instruct the said jury to find a verdict in favor of the respondents; to which direction and instruction the counsel for the said plaintiff did then and there duly except."

This is a proceeding in which the public are not interested. The information should show upon its face that the relator is in some way interested in the action complained of, either as a corporator or member of the society; but there is nothing in the information or replication to show by what right John Blomquist sets the inquiry on foot as to the right of the respondents to hold and exercise the office of trustees. As the point is not noticed in the briefs of counsel, and as we have reached a conclusion adverse to the people, we shall not place our decision upon that ground.

While it is true that the chairman of the board of trustees had no right to adjourn the meeting for the

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election of officers of his own motion, it is equally true that the meeting did disperse. Several members announced that at 2 o'clock of the same day the meeting would assemble and proceed to the election. The members, but not all, did assemble at 2 o'clock. A meeting was organized, and an election for trustees held, and the respondents elected. They have qualified, and are discharging the duties of their offices.

It cannot be said that the proceedings were regular. But the fact that the chairman of the regular meeting assumed and exercised an authority which he did not rightfully possess could not deprive the members of the society from their legal right to choose their trustees. Neither could the fact that the proper presiding officer refused to take part in the meeting held in the afternoon prevent the members from choosing trustees. The members so assembled on the afternoon of the day appointed in the notice did elect respondents trustees, and no other election was held, and the trustees so chosen, although it may be irregularly, are entitled to hold their office of trustees until others, at least, who have a better title to the office, are chosen. *Roeser v. Gartland*, 75 Mich. 143.

It would be quite unseemly, as well as detrimental to the best interests and harmony of religious societies, if courts should interfere with their internal affairs when no property rights are involved, simply because the regularity of their proceedings may be open to question by some disaffected party. In the case of an intrusion upon an office, the Court has discretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by it. *Vrooman v. Michie*, 69 Mich. 44.

We think this is a case for the exercise of our discre-

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tion, and we shall quash the information, with costs against the relator.

The other Justices concurred.

MINNIE FEIERTAG v. JULIA FEIERTAG.

[See 73 Mich. 297.]

Pleading—Bill of particulars—Amendment of declaration—Services—Question for jury.

1. Where, on the reversal of a judgment, the necessity of an amendment of plaintiff's bill of particulars was suggested, and, instead of making such amendment, an amended declaration was filed, which set forth plaintiff's claim with sufficient definiteness, there is no force in an objection that the bill of particulars was not amended.
2. In this case it appears beyond dispute that plaintiff was engaged in the business of dress-making during the time covered by the declaration, and that defendant received her wages. The disputed questions of fact were the amount of such earnings, the agreement under which they were so received, and the settlements which defendant claimed were made, all of which were fairly submitted to the jury.

Error to Wayne. (Brevoort, J.) Argued April 24, 1890. Decided May 2, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion, and in 73 Mich. 297.

John G. Hawley and *William Look*, for appellant, cited no authorities.

E. T. Wood, for plaintiff, cited no authorities.

GRANT, J. For a statement of this case, we refer to

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Feiertag v. Feiertag, 73 Mich. 297. This Court then held that there was sufficient testimony to go to the jury under the count for money had and received; but the case was reversed for errors, and a new trial ordered, with a suggestion to the plaintiff's attorney to apply to the court for leave to amend his bill of particulars.

Instead of amending his bill of particulars, the attorney obtained leave and amended his declaration, averring that the defendant was indebted to the plaintiff in the sum of $2,770 for money paid by the plaintiff to the defendant, at her request, at various times between November 30, 1881, and April 4, 1887, to wit, 277 weeks at $10 per week; and in a like sum of money then and there received by the defendant for the use of the plaintiff from, to wit, November 30, 1881, up to and including April 4, 1887, in sums ranging from $3.50 to $18 per week, $2,770. No bill of particulars was demanded under the amended declaration, nor was one necessary; for, under the circumstances, plaintiff's claim could not have been more definitely set forth than it was in the declaration. There is no force, therefore, in the defendant's objection that the bill of particulars filed under the original declaration was not amended.

It appears beyond dispute that the plaintiff was engaged in the business of dress-making during all the time covered by the declaration, and that the defendant received her earnings. The disputed questions of fact were the amount of her earnings, the agreement under which the defendant received them, and the periodical settlements which the defendant claims were made. All these questions were for the determination of the jury, and were properly submitted to them. No complaint is made of the charge of the court, except that it should have instructed the jury to find a verdict for defendant.

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In view of the full discussion of the case upon the former hearing, further comment here is unnecessary.

Judgment affirmed.

The other Justices concurred.

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THE HARTFORD IRON MINING COMPANY v. THE CAMBRIA MINING COMPANY.

Corporations—Authority of officers and agents—Deed—Boundary line—"Half" defined.

1. A corporation cannot be held to have contracted unless its officers or agents who make such contract have express or implied authority to bind the corporation, and even individual directors have no power to bind the corporation; citing *Lockwood v. Boom Co.*, 42 Mich. 539.
2. The word "half," when used in describing lands, should be construed as meaning half in *quantity*, unless the context or surrounding facts and circumstances show a contrary intention; citing *Jones v. Pashby*, 62 Mich. 614; *Heyer v. Lee*, 40 Id. 353; *Dart v. Barbour*, 32 Id. 271.

   So *held*, where a mining company executed mining leases of the east half and of the west half, respectively, of a fractional 40 acres of land fronting on a meandered lake, describing the same as a lot according to the government description, but with nothing in the context to show that the words were used in any other than a *literal* sense.

Error to Marquette. (Grant, J.) Argued April 24, 1890. Decided May 2, 1890.

Trover. Plaintiff brings error. Reversed. The facts are stated in the opinion.

F. O. Clark (*W. P. Healy*, of counsel), for appellant.

A. B. Eldredge (*D. H. Ball*, of counsel), for defendant.

LONG, J. Prior to December 1, 1875, the Teal Lake Iron

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Mining Company was the owner of lot 5, section 36, in township 48 N., of range 27 W., Marquette county, this State.

On that day the company made and executed to James H. McDonald and R. P. Harriman a mining lease of the west half of said lot. By the terms of this lease the second parties were licensed to enter upon the lands, and to dig thereon, and mine and carry away therefrom, iron ore, for the term of ten years, they having the exclusive right of mining and to carry away ore, and the right to erect thereon and maintain such buildings and machinery as might be necessary for the thorough and successful prosecution of said work. This lease further provided that the second parties should not occupy any portion of said lands for the purposes of carrying on any trade, business, or occupation except said mining, or such other work or business as is necessarily incidental thereto. This instrument was duly acknowledged, and recorded in the office of the register of deeds of that county, August 26, 1882. Subsequently, and prior to March 16, 1882, this lease was assigned to the Cambria Mining Company, a corporation, the defendant herein. On March 16, 1882, the lease was extended until December 1, 1895, and the assignment and extension duly recorded.

On June 1, 1887, the Teal Lake Iron Mining Company made and executed a similar lease of the east half of said lot 5 to the Hartford Iron Mining Company, of Milwaukee, a corporation organized and existing under the laws of Wisconsin, the plaintiff in this suit. This lease was to continue in force for the period of twelve years from its date.

This action of trover is brought to recover the value of 5,000 tons of iron ore alleged to have been wrongfully taken by the defendant from the land of the plaintiff. This lot 5 is in the Negaunee iron range, and borders upon Teal lake. The following diagram will show the situation:

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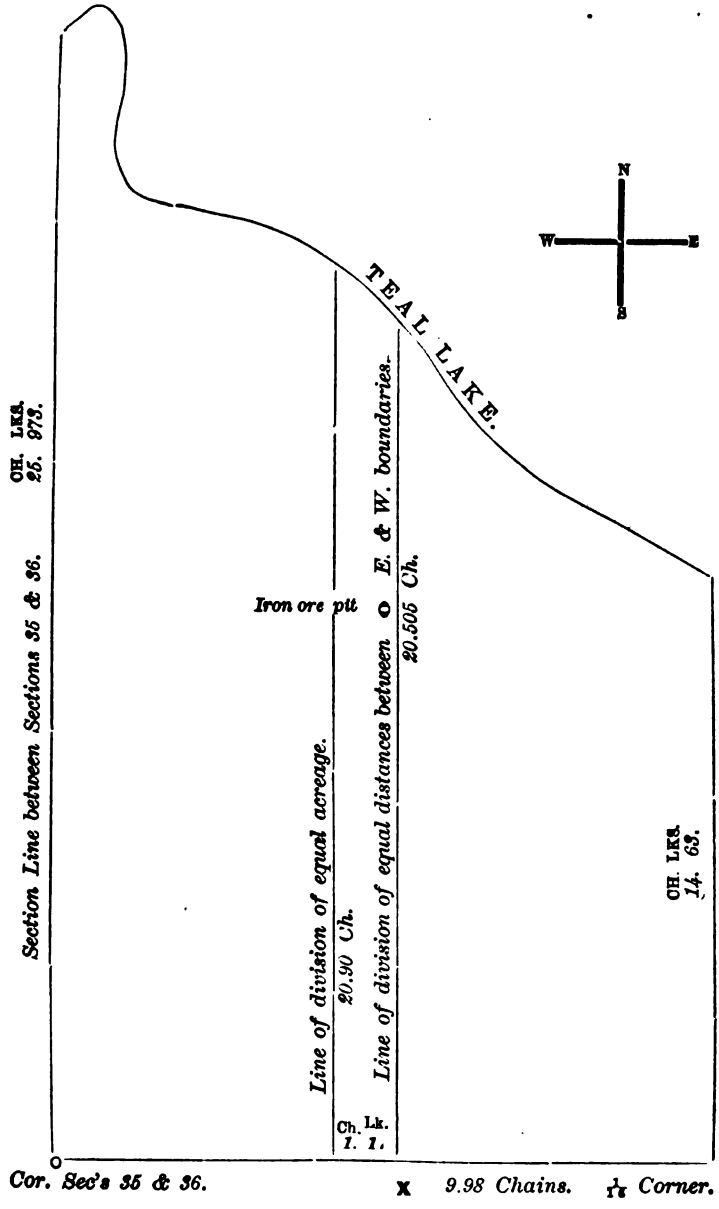
PLAT OF LOT 5, SEC. 36, T. 48 N., R. 27 W.



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It appears that a dispute arose some time in 1888 between the two companies as to where the dividing line should be located between the *east half* and *west half* of this lot 5; the defendant company claiming that the line should be run due north from a point equidistant between the south-east corner and south-west corner of the said lot to Teal lake, and being a line parallel or equidistant between the east line and the west line of the said lot, running due north to Teal lake; that, the south line of the lot divided into equal parts, the line between the two running due north would be the proper and legal subdivision, irrespective of the acreage of land contained in either subdivision. The plaintiff company denied that position, and claimed that the east half was one-half of the acreage in lot 5, and that the line should be run between the east and west lines to Teal lake at such a point as would make an equal subdivision of acreage between the east half and the west half of the lot. The two lines on the above diagram were run by Mr. George P. Cummings, an engineer, the easterly line being at the point equidistant between the corners, and running due north. The other is the line of subdivision of equal acreage.

It appears that Benjamin Neely, in 1884, had an option for a lease of the east half of lot 5, to explore for iron ore. He continued his explorations, and some time in August, 1886, discovered ore at the point marked on the diagram as "Iron Ore Pit." After the plaintiff company was organized, it opened up the ore, and was mining in this pit, when the defendant company took possession from it, claiming to own the ore already mined, as well as the ore in the pit to be mined, and proceeded to take and convert to its own use 5,000 tons of this ore, claimed to be worth from $4 to $4.50 per ton at the pit.

But two questions are raised:

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1. Which is the line,—the one that divides the lot into equal acreage, as claimed by the plaintiff, or the one that divides it by a line running north and south from a point equidistant between the two south corners, above referred to?

2. It appears that H. H. Stafford, after he was appointed general manager of the plaintiff company, employed the engineer, Cummings, to run a line between the east half and the west half of this lot, and Mr. Cummings commenced at the point equidistant between the corners on the south line, and ran the east line as indicated on the diagram, and which would come east of the pit where the ore was taken out. Subsequently the plaintiff employed Mr. Cummings, the same engineer, to run a line which would divide the lot into two equal parts as to acreage, being the west line indicated on the diagram, and which runs some distance to the west of the pit of iron ore in question. It is therefore contended by the defendant that, the plaintiff's agent having caused this line to be run, it was an acquiescence in the boundary line at that point, and the plaintiff company cannot now question it.

Some other facts are shown as to the arrangement for the running of these lines; and it is claimed that Mr. Maitland, the agent of defendant company, paid one-half of the expenses of running the east line, and that there was some sort of agreement between the agents of the two corporations that this east line, so run by Cummings, would be satisfactory. There is no showing, however, that the plaintiff company, by any act except that of the general manager, as above, ever made any agreement that this should be treated as the true line of division between the east and west half; and no authority is shown to the agent of plaintiff to make any such arrangement or agreement. A corporation cannot be held to have contracted unless its officers or agents who make such contract have express or implied authority to bind the corporation, and even individual directors have no power to bind the corporation. *Lockwood v. Boom Co.*,

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42 Mich. 539. There is no force in the second proposition, and it need not be discussed at length.

The rights of the parties must, therefore, be settled by a construction of these two mining leases, as to where the true dividing line is to be found,—whether by equal distances from east to west or by equal acreage. In *Au Gres Boom Co. v. Whitney*, 26 Mich. 42, it appears that a very similar question arose. The land was bounded on the west side by the Au Gres river. This river is not a straight line at this point, and the north line of the land is longer than the south line. No line between the north and south half was ever agreed upon. The circuit judge directed such division as would give the complainant in that case one-half of the river front; that is, he made the dividing line one of equal distance from the north and south lines of the lot. This was held to be erroneous; that the north half must mean the north half in quantity, divided from the remainder by an east and west line. This ruling was followed in *Dart v. Barbour*, 32 Mich. 271. It was there said:

"Each deed was for a half of the lot, and, unless we distort the sense, we are compelled to find according to the idea imported by the words; and the idea imported by the words 'half of the lot' is half in quantity."

This rule was again followed in *Heyer v. Lee*, 40 Mich. 353, and the former cases cited. Again, in *Jones v. Pashby*, 48 Mich. 634, the same question was presented, and the former opinions cited and approved. But it was said by Mr. Justice COOLEY that—

"There can be no universal rule that the word shall be so interpreted, for it is often used in conveyances when the context indicates a sense quite different. Two parts of a farm separated by a river or a highway may be called the 'two halves' without much regard to their relative quantity; and in surveys the word 'half' is often used quite as loosely, but without the least confusion.

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In all such cases the word must be taken in the sense intended, if that is evident; and, if not, the accompanying circumstances and the subsequent acts of the parties may, perhaps, direct us to the true meaning."

It appeared in that case, however, that the land was so partitioned by mutual conveyances as to make it uncertain where the dividing line lay. A subsequent grantee of one portion built a house on the doubtful strip, and mortgaged it, and the mortgagee went into possession. On the foreclosure, certain persons impleaded as subsequent incumbrancers made it part of their defense that the mortgagee should account for rents and profits; and decree was rendered on that basis. It was held that they were thereafter estopped from bringing ejectment for the disputed strip as grantees from the adverse claimant. Again, in *Jones v. Pashby*, 62 Mich. 614, Mr. Justice CHAMPLIN, speaking for the Court, held that the word "half," when used in describing lands, should be construed as meaning half in quantity, unless the context or surrounding facts and circumstances show a contrary intention; and in support of this doctrine he cites *Au Gres Boom Co. v. Whitney, supra, Dart v. Barbour, supra,* and *Heyer v. Lee, supra.*

Counsel for defendant, however, while not disputing that the rule has been fully established and settled by these cases as to the construction and interpretation of the words under the circumstances stated in those cases, contend that there are circumstances appearing here which plainly distinguish this case, on principle, from those; that the Teal Lake Company, the licensor, was, by virtue of its ownership of lot 5, also the owner of a large quantity of land under Teal lake, and which land is a part of lot 5, and would pass by a conveyance of it, —that is, that lot 5 embraces all the land included within its east and west lines, extended north to the

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center of the lake; that iron ore is a rock and a part of the formation of the country, and is found, dipping with the rocks, in lenses and veins; that it does not usually lie in perpendicular deposits, but, like nearly all other minerals, inclines with the surrounding rocks, so that, not infrequently, if found on one 40-acre tract, its dip will carry it onto an adjoining tract at greater depth; that the mining laws of the United States are framed with reference to the well-known facts of the dip of ore formations, section 2322 of the Revised Statutes providing that all locators of mining claims shall have the exclusive enjoyment of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of the surface lines of said claims, although such veins, lodes, or ledges so far depart from a perpendicular course downward as to extend outside of the vertical side lines of such claims.

That by the terms of both licenses the parties to this suit were entitled to enter, the one upon the east half, the other upon the west half, of lot 5, and to dig thereon, and mine and carry away, iron ore, and that, beyond this right to mine ore, and such occupation as is incident thereto, neither party obtained any rights in any part of lot 5, but, on the contrary, the licensor expressly retained such rights; that when these facts are taken into consideration, and the purposes of the licenses in controversy are considered, the intention of the parties, drawn from the instruments themselves, would seem to be clear that each should take one-half in quantity—one-half in acreage—of all of lot 5 which was or might be useful for the purposes expressed in the licenses, and that it is clear that the whole lot, both the land under the water and the land above the water, is of equal value, of equal use, for mining purposes; and that, therefore, the line of equal distances from the east and west line of the lot,

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drawn northward, is the true boundary between the east and west half. That is, counsel contend that the court must take these evidences of extraneous circumstances to aid in the interpretation of the words used in these licenses.

These evidences are never to be resorted to unless there is some ambiguity in the instrument under consideration. There should be interpretation only when it is needed,—that is, only where, without it, the meaning or effect of the contract would be in doubt; and, assuming such need, the rule most conspicuous and wide-reaching of all is that a written contract shall be so interpreted as, if possible, to carry out what the parties meant. There is no possible ambiguity about these descriptions. It is the east half and the west half of a specified lot. The lot and its boundaries are fixed by the government survey. It is bounded upon the south by an east and west line, on the east and west by a north and south line, and on the north by a meandered lake frontage. Lot 5 consists principally of the S. W. ¼ of the S. W. ¼ of section 36, taking in, however, a small portion of the land bordering on the lake, on the north 40 acres adjoining. The government description, however, is "Lot 5, section 36," containing 42 and 70-100 acres of land. It is evident that the parties to this controversy, when taking their licenses for mining purposes, and the grantor in the licenses, had reference to lot 5 as platted and located, and as containing 42 and 70-100 acres of land. The literal significance of the word "half" is one of two equal parts into which anything may be divided, and that is the effect of the decisions of this Court above cited. There is nothing in the context which shows that the words were used in any other than a literal sense. The mere fact that the lands were to be used for mining purposes instead of some other purpose cannot vary or

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change the rule of interpretation. It may be possible that plaintiff, in following some vein of ore, may find that it extends beneath the waters of Teal lake. There is nothing in the facts and circumstances of this case indicating that it was the intention of the parties to mine under Teal lake, nor is there anything in the case showing that there is any ore under Teal lake. We are not, however, called upon to determine the equities between the parties, but to give construction to the words employed by the parties in making the contracts. These words not only have a literal signification, but had, long prior to these grants, received judicial interpretation.

Under the circumstances of this case and the situation of the premises, had these licenses granted to the parties a north and a south half, then, under defendant's claim, one might have had only a few acres of land outside of Teal lake, and in fact his half might be almost entirely submerged, and of no practical use even for mining purposes; and yet the interpretation claimed by defendant might be as plausibly urged as in the present division.

It must be held that the true boundary line between these two pieces of land is by a line, drawn north and south, dividing the lands into equal acreage. The circuit judge, on the trial in the court below, took a different view of the licenses, and held, as claimed by defendant, that the true line was one to be drawn at equal distance, from the east and west lines, and directed verdict and judgment for defendant.

The judgment must be set aside, with costs, and a new trial ordered.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. GRANT, J., did not sit.

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THE PEOPLE v. MARK T. BUSSEY.

Criminal law—Practice in Supreme Court—Agreement for continuance.

1. The agreement of the Attorney General, or prosecuting attorney of the proper county, for the continuance of the hearing of a criminal case in the Supreme Court, is binding upon both of said officers.
2. Act No. 72, Laws of 1887, which makes it the duty of the prosecuting attorney to appear in the Supreme Court in criminal cases removed from his county, is construed as requiring him to furnish a brief and make the main argument, but the management of the case remains under the control of the Attorney General.

Error to Jackson. (Peck, J.) Argued April 29, 1890. Decided May 2, 1890.

Respondent moved for a continuance of the case, as per agreement with the Attorney General. Motion granted. The facts are stated in the opinion.

A. J. Sawyer, for motion.

Eugene Pringle, Prosecuting Attorney, *contra.*

CHAMPLIN, C. J. Motion is made on behalf of Bussey to continue the case over the term. In support of the motion, it appears that the Attorney General consented that the cause might be continued, and, relying upon such consent, counsel for Bussey had made no preparation for the argument of the case at this term, and, as the hearings of the State cases are set for May 1, and this being April 29, preparation for the hearing could not be made in the mean time.

The continuance is opposed by the prosecuting attorney

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of Jackson county, in which the conviction was had. It is claimed that, since the passage of Act No. 72, Laws of 1887, the conduct of criminal cases in the Supreme Court devolves exclusively upon the prosecuting attorneys of the several counties from which they are removed, and that the Attorney General had no authority to consent to the continuance. In order to determine whether this claim is well founded, we must construe this statute in connection with existing statutes, and the rules of practice of this Court.

How. Stat. § 286, enacts that the Attorney General shall prosecute and defend all actions in the Supreme Court in which the State shall be interested or a party. Section 288 makes it his duty to consult and advise the prosecuting attorneys when requested by them, and to make a report to the Legislature specifying the suits which he has attended, the number of persons prosecuted, and the crimes for which, and the counties where, such prosecutions were had, and the results and punishments awarded. Section 8683 requires notice of application for writ of error, in cases of treason and murder in the first degree, to be given to the Attorney General. Section 8696 requires the Clerk of the Supreme Court to forthwith notify the Attorney General whenever a writ of error or *certiorari* is issued, and section 8697 makes it the duty of county clerks, where a case is made before judgment, and when a bill of exceptions in criminal cases is signed and filed, to notify the Attorney General at once of such filing. Act No. 79, Laws of 1885, amends section 9577 so as to require the respondent to serve upon the Attorney General a copy of his assignment of errors, upon which he relies, within five days after the return of the record to this Court. Rule 30 of the Supreme Court also requires all exceptions, together with a copy of the indictment or information, and the whole record upon which the case

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is to be heard, to be served upon the Attorney General at least 20 days before the next term of this Court, or within such other time as the judge who tried the cause, or one of the Judges of this Court, shall direct.

Under this legislation and rule, it was always the practice, as it was the duty, of the Attorney General, to conduct and control all criminal cases in this Court; and this continued until the enactment of 1887, which provides—

"That, in all criminal proceedings removed to the Supreme Court by appeal or otherwise, it shall be the duty of the prosecuting attorney of the county from whence any cause is so removed to appear on behalf of the people therein, and, with the advice and assistance of the Attorney General, to conduct such cause in such Court."

There is no repealing clause to this act, and it is our duty to so contrue it with existing legislation that the enactments may stand together, unless plainly repugnant.

We think the acts can be harmonized by construing Act No. 72, passed in 1887, as requiring the prosecuting attorney to prepare a brief and make the main argument before this Court, the duty of the Attorney General being to advise and assist in the argument. We do not think the Attorney General is relieved of the duty imposed upon him to prosecute and defend all actions in which the State is a party or interested. The statutes requiring notice to be given to him of proceedings in criminal cases, and requiring records and assignment of errors to be served upon him, and reports to be made by him, show that the management of criminal cases is still under his control.

It is to be presumed that the Attorney General and prosecuting attorney will act in harmony; and, in matters where each has a voice in the conduct of the case, such

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as arrangements or agreements with opposing counsel with reference to a cause, we must hold, as we do where there are two or more attorneys in a cause, that the agreement of either one is binding upon both. *Pantlind v. Osceola Circuit Judge*[1] (motion, January 7, 1890). The Attorney General acted in good faith in consenting to the continuance, and for the reason that he had not the time before the case would be reached to prepare to assist in the argument. The cause will be continued over the term.

The other Justices concurred.

EDGAR L. GRAY v. SAMUEL JONES.

Statute of limitations—Absence from State—Commencement of suit—Jurisdiction.

1. The commencement of suit in which jurisdiction is obtained over the person of the defendant fulfills the purposes of the statute of limitations as to *that* cause of action by affording to the plaintiff his remedy.
2. The court having obtained jurisdiction over the person of the defendant, he is considered as being present in the forum during the pendency of the suit for all purposes of the remedy, and consequently as to *that* cause of action the statute is operative and running during the pendency of the suit.
3. While such suit is pending no new suit can be commenced for the same cause of action, nor afterwards, if the limitation of time has elapsed during the pendency of the *first* suit.

Error to Newaygo. (Palmer, J.) Argued April 11, 1890. Decided May 9, 1890.

[1] No opinion was filed in this case, which was an application for *mandamus* to compel the setting aside of the service of a declaration.

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Trover. Defendant brings error. Reversed. The facts are stated in the opinion.

A. G. Day and *Smith, Nims, Hoyt & Erwin,* for appellant.

George Luton (*D. E. Corbitt,* of counsel), for plaintiff.

CAHILL, J. The plaintiff recovered a judgment in trover against the defendant for $5,000 in the Newaygo circuit, and the defendant brings error.

The view we take of the case makes it necessary for us to examine but one question. This suit was commenced under the statute of 1883 (Laws of 1883, p. 166), by attachment issued out of the circuit court for the county of Newaygo on February 2, 1885, by which writ the sheriff was commanded to attach so much of the property—

"Of the defendants as will be sufficient to satisfy the demand of plaintiff, as set forth in his affidavit, and costs of writ."

The demand, as set out in the affidavit, consisted in the claim that in 1867 Gray was the owner—

"Of the west half of the north-east quarter of section twelve, in town No. eleven north, of range No. twelve west, containing eighty acres; that during the winter following there was cut and removed from said land, without leave or license of affiant, three hundred thousand feet, board measure, of pine saw-logs; and that during the summer and fall following, said logs, being of the value of eighteen hundred dollars at the time of conversion, were converted by Samuel F. Jones and Charles Barton, and that such conversion occurred in the said county of Newaygo."

On February 3, 1885, the plaintiff obtained from the circuit court commissioner the indorsement upon said writ of an order, as follows:

"Let the property of the defendants named in the

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within writ be attached to the amount of two thousand dollars."

On the same day the sheriff attached the interest of the defendants in certain lands, which were appraised at $960. June 13, 1885, a declaration on the common counts in *assumpsit* was filed. No appearance being entered by the defendants, their default was entered, and on July 6 a judgment was rendered in favor of the plaintiff for $2,119 and costs. On November 10, 1885, this judgment was, on motion of the defendants, vacated, and a new trial granted. The plaintiff was, in the same order, given leave to file a new declaration. On December 4, 1885, the plaintiff filed a declaration in trover, charging:

1. The conversion, on the first of November, 1867, of four thousand pine saw-logs, of the value of five thousand dollars.
2. The conversion on the same day of four thousand pine saw-logs, and five hundred thousand feet of pine saw-logs, board measure, of the value of five thousand dollars.
3. The conversion on the same day of four thousand pine saw-logs, of the value of five thousand dollars.

The defendants pleaded the general issue, and gave notice that the said several supposed causes of action did not accrue to the plaintiff within six years.

On the trial the plaintiff's evidence tended to show that he was the owner, in 1867 and 1868, of certain descriptions of land on section 12, township 11 N., range 12 W., in Newaygo county; that during that season Robinson & Patterson were lumbering on that section, and in the course of their operations cut a quantity of timber from his lands, and put the logs in the Muskegon river; that these logs were cut on lands adjoining the lands of B. Merrill & Co., a firm doing business in Chicago, and composed of B. Merrill, Charles Barton, and

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the defendant; that the firm of B. Merrill & Co. purchased the logs cut by Robinson & Patterson that season afloat in Muskegon river, and that among the logs so purchased were the plaintiff's; that Mr. Merrill died in 1868, and Mr. Barton died in 1886, after the commencement of this suit, and that his death had been suggested upon the record; that defendant Jones resided at Chicago, Ill., in 1867, and had lived there ever since

The plaintiff, being sworn as a witness on his own behalf, testified that in June, 1868, he had a conversation with Mr. Merrill about these logs that had been cut from his land, but was unable to bring about a settlement; that in May, 1869, he had a conversation with the defendant Jones at the village of Newaygo about the same matter. He further testified as follows:

"I spent nearly all the forenoon with Mr. Jones, talking the matter over. He said that Patterson logged for the firm of B. Merrill & Co., and that they had the logs, and that when he [Patterson] ran away, between the first of February and the first of March, 1868, George McClellan took charge of the job, and ran it for them. Jones said Patterson logged for him, and that the land belonged to them; that McClellan was their agent, and ran the job for him; and the only claim that Jones made was this: That Oliver Seaman had told him that there were but very few logs cut. He insisted that I ought to see Robinson & Patterson; that they had lost money for the firm any way; and, after talking with him all the forenoon, I sued him before he left town, and in the afternoon we talked the matter over again."

With reference to this suit, so commenced by the plaintiff, he further testified that May 31, 1869, he commenced a suit against Barton and Jones for this same trespass, by summons, claiming $600 damages; that there was a personal service of the summons upon Mr. Jones on the date of its issue, and that that suit was never prosecuted, but was afterwards, and in the year 1885, discontinued.

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The record shows that the suit begun in 1869 was discontinued on motion of the plaintiff, by a formal order entered November 10, 1885, and that it was for the same cause of action as the present one.

The question in the case, upon these facts, is whether the statute of limitations had run against this action when it was commenced, on February 2, 1885. The section of the statute which applies to this action is How. Stat. § 8713, and is as follows:

"The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards; that is to say: * * * * * * *

"4. All actions of *assumpsit*, or upon the case, founded upon any contract or liability, express or implied. * *

"6. All actions of replevin and trover, and all other actions for taking, detaining, or injuring goods or chattels."

Under this statute this action was clearly barred, unless, by reason of the defendant's absence from and residence out of the State since the action accrued, the running of the statute had been suspended. Section 8721, How. Stat., provides as follows:

"If, at the time when any cause of action mentioned in this chapter shall accrue against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into this State; and if, after any cause of action shall have accrued, the person against whom it shall have accrued shall be absent from and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action."

The proof being undisputed that the defendant, at the time this action accrued, was absent from and resided out of the State, and there being no evidence that since such action accrued the defendant had been within the State for a sufficient length of time for the statute to run in his favor, it is clear the plaintiff's action was not barred

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in 1885, unless the commencement of his suit in 1869 has affected his rights. Section 8721, above quoted, covers two classes of cases:

1. Those in which the defendant shall be out of the State at the time when the cause of action accrues.
2. Those in which, after the action shall accrue, the defendant shall be absent from and reside out of the State.

In either case the purpose of the statute is to secure to the plaintiff the same time, and only the same time, in which to commence his action against an absent or non-resident defendant, that he would have if the defendant were an actual resident of the State. But the plaintiff's privilege under this section extends only to the commencement of his suit. When his suit is once commenced, and due personal service of process has once been made upon the defendant in such suit, or he has appeared therein, the purpose of the statute has been accomplished. When the defendant came into the State in May, 1869, the statute commenced to run, and would have continued to run so long as he remained in the State but for the commencement of the plaintiff's suit. The commencement of a suit suspends the running of the statute as well against a non-resident as a resident. The running of the statute being thus suspended by the commencement of suit in 1869, there was no room for section 8721 to have any further effect.

The whereabouts of the defendant after personal service could not and did not affect the court's jurisdiction; neither could it affect the running or suspension of the statute of limitations. The provision in the statute suspending its running during the time the person against whom a cause of action shall have accrued shall be absent from and reside out of the State was not intended and does not apply to persons over whom the courts of the

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State shall have obtained jurisdiction in the particular cause of action. While the commencement of suit operates to suspend the running of the statute so long as the plaintiff prosecutes the suit so commenced, yet it will continue to run as against any other suit for the same cause of action, unless the plaintiff can continue to claim the benefit of section 8721 indefinitely. We think he can claim under it but once. As is well said by counsel for plaintiff, the question of whether the statute runs or not is governed wholly by the statute. That plaintiff's present action is barred by section 8713, unless it is saved by section 8721, is conceded. For the reasons already stated, we think the commencement of suit in 1869 for this same cause of action was an acceptance of the opportunity offered by the latter section, and that with such acceptance that provision of the statute spent its force.

We are not referred to any authorities bearing upon the exact point deemed by us decisive of this case. The question has not before been raised in this Court, and we do not find that it has been considered by the courts of other states where similar statutes are in force. We find ourselves unable to give to this statute any other construction than the one here indicated. Some of my brethren choose to put their reasons in different language, but we are all agreed that the plaintiff's action was barred.

The judgment must be reversed, with the costs of both courts to the defendant.

GRANT, J., concurred with CAHILL, J.

CHAMPLIN, C. J. I concur with my Brother CAHILL in the reversal of the judgment. It appears that the last suit is for the same cause of action for which the first suit was instituted. The statute prescribes that actions like those involved in this suit shall be commenced within

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six years next after the cause of action shall accrue, and not afterwards. It then makes provisions for exceptional cases, which, so far as are material to this case, are mentioned in the opinion of my Brother CAHILL. I base my concurrence upon the following reasons:

The commencement of suit in which jurisdiction is obtained over the person of the defendant fulfills the purposes of the statute as to that cause of action by affording to the plaintiff his remedy. The court having obtained jurisdiction over the person of the defendant, he is considered as being present in the forum during the pendency of the suit for all purposes of the remedy, and consequently as to that cause of action the statute is operative and running all the time while the suit is pending. While such suit is pending no new suit can be commenced for the same cause of action, nor afterwards, if the limitation of time has elapsed during the pendency of the suit.

MORSE and LONG, JJ., concurred with CHAMPLIN, C. J.

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HAMILTON J. SNYDER v. THE WASHTENAW CIRCUIT JUDGE.

Estates of deceased persons—Commissioners on claims—Appeal—Filing record in circuit court.

An appeal properly claimed, perfected, and allowed in the probate court ought not to be dismissed for a failure to file the record in the circuit court within the thirty days limited by Act No. 175, Laws of 1897, if such record is filed before the motion to dismiss is actually heard.

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Mandamus. Submitted April 22, 1890. Denied May 9, 1890.

Relator applied for *mandamus* to dismiss an appeal from the allowance of a claim by commissioners on claims in probate court. The facts are stated in the opinion.

B. M. Thompson, for relator.

A. J. Sawyer, for respondent.

CAHILL, J. The relator asks for a *mandamus* to require respondent to dismiss an appeal claimed to have been taken by Hattie J. and Augusta E. Campbell, as heirs at law of Sardinnaiette Snyder, deceased, from an allowance, by the commissioners appointed in said estate, of relator's claim at $773.70.

Hattie J. and Augusta E. Campbell lived in Detroit. They employed counsel in Washtenaw county, where the estate was being administered, to make and perfect their appeal. On December 30, 1889, under direction of counsel, they made and filed in the probate court of Washtenaw county the following papers:

1. Their claim of an appeal.
2. Their bond, with sufficient sureties, which was approved.

On the same day an order was made by the probate court allowing the appeal, and requiring notice thereof to be given to Hamilton J. Snyder, the relator, within 10 days. On January 2, 1890, due personal service was made on relator as required by this order. January 6, appellants filed in the circuit court duly-certified copies—

1. Of their claim of appeal.
2. Of the order allowing the same.
3. Of the order fixing the mode of service, and of proof that such service had been made.

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The following papers were not filed at that time, nor within 30 days after the allowance of the appeal:

1. A certified copy of the record and allowance appealed from.
2. A certified copy of the bond given on appeal.

On February 11 the attorney for appellants, having learned of the omission to file the papers last mentioned, procured and filed the same on that day. The appellants did not personally know of the fact that the complete record had not been filed until March 22.

The next term of the circuit court of Washtenaw county, after the expiration of the 30 days from the time of making said appeal, commenced on March 3, 1890; and appellants had caused said cause to be printed upon the issue docket of that term for trial. It is the practice of the court, on the first day of the term, at the opening of the court, to make a formal call of the issue docket, a copy of which is printed and placed in the hands of each attorney having business before the court at that term.

When the cause was reached upon the formal call of the docket on the first day of the term, the attorney for the relator stated to the court that the cause was not properly upon the docket for trial. The attorney for the appellants was not present in court; but some other attorney then present remarked to the court, and to the attorney for the relator, that no notice of trial was necessary for the first term of court after an appeal of this sort was taken. The attorney for the relator made no motion to strike the cause from the docket, or to dismiss the appeal; nor did he state to the court that there was any error committed in perfecting the appeal. The judge marked the cause for trial on the court's docket; the attorney for the relator stating that he waived no rights.

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The cause was not reached for trial until after March 15, and not until after the expiration of the first 10 days of the term; during which time no motion was made to dismiss the appeal, nor was the attention of the court in any way called to any defect or error in the appeal, or in the perfecting thereof.

On March 15 the relator entered a motion to dismiss such appeal, serving a copy thereof, and of the accompanying affidavits, upon the attorney for the appellants. On March 24 the appellants filed in the circuit court a petition reciting the various steps that had been taken by them for perfecting their appeal, the action taken by the attorney for the appellee, and praying that, if any order was necessary in the premises, one might be made permitting them to complete and perfect the appeal, or an order be made holding and decreeing said appeal to have been made and perfected in due time, and for such other order as they might be entitled to in the premises. The motion to dismiss the appeal, and the petition to confirm or reinstate the same, came on to be heard together on March 28; and on April 5 an order was made denying the motion to dismiss the appeal, and directing that the appeal be allowed, and held as if made in time. After the entry of this order a motion was made by relator to vacate and set it aside. This motion, having been brought on to be heard in the circuit court, was denied. This application is now made to require the respondent to grant such motion. A decision of the case involves a construction of the statutes allowing appeals to the circuit court from commissioners on claims.

How. Stat. § 5911, relating to such appeals, was amended by Act No. 175, Laws of 1887, so as to read as follows:

"The party appealing shall procure and file in the

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circuit court to which the appeal is taken, within thirty days after the appeal is allowed, a certified copy of the record of the allowance or disallowance appealed from, of the application for and the bond on appeal filed in the probate court, and of the order allowing such appeal, together with evidence that notice has been given to the adverse party according to the order of the probate court. And, in case the record herein required to be filed in the circuit court shall not be filed [in] such court within the time herein directed, such appeal shall cease to be of effect, and the allowance or disallowance so appealed from shall stand as though such appeal had not been taken, and the certificate of the clerk of such circuit court of the filing or non-filing of such record in the circuit court may be filed in the probate court from which such appeal was taken, and when so filed shall be treated as evidence: *Provided,* That the circuit court to which the appeal is taken shall have power upon application, within the first ten days of the term of court next succeeding the expiration of the said thirty days for filing said certified copy, to reinstate said appeal, when the party making the appeal has been prevented from perfecting the same by circumstances not under his control."

It is claimed that the appeal in this case was not regularly made and perfected within the 30 days provided by this statute, for the reason that the complete record required to be filed in the circuit court was not filed within that time; that by such failure the attempted appeal was a nullity; and that the circuit court never acquired jurisdiction of the proceeding. We think counsel for relator loses sight of sections 5907, 5908, and 5910, which are not affected by the amendment of 1887. Section 5907 provides that certain persons may appeal—

"If application for such appeal be made in writing, filed in the probate office, within sixty days after the returning of the report of the commissioners."

Section 5908 provides that a bond shall be made and filed in the probate court within the same time, and before the appeal shall be allowed. Section 5910 provides that the person appealing shall give notice of such

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appeal, and of the hearing thereof, in the circuit court, in such manner as the probate court shall direct, etc. These provisions all seem to contemplate that the appeal has been made and allowed by the action in the probate court. Section 5911, as amended in 1887, is in accord with this view. It requires the record to be filed in the circuit court "within thirty days *after the appeal is allowed.*" If such papers are not filed, "such appeal shall *cease to be of effect,*" indicating that the appeal is considered as having been made perhaps 30 days before. The proviso giving the court power to reinstate an appeal when the party has been prevented from perfecting the same by circumstances not under his control shows jurisdiction in the circuit court although the record may not have been filed.

The proceedings under section 5911, as amended, are not unlike those provided for by How. Stat. § 6740, for the return to this Court of the record in a chancery appeal. By that section it is provided that, if an appellant shall neglect to pay to the register the fee for making return for 30 days after such appeal has been perfected, he shall be deemed to have waived his appeal, and the appellee may at once proceed to enforce his decree, the same as if no appeal had been taken. In construing this provision, it was held that an appeal would not be dismissed for imperfections in the record returned. *Verplank v. Hall*, 21 Mich. 469. This Court has refused to dismiss a chancery appeal for the failure to cause a copy of the record to be transmitted to this Court within the time provided by the statute, if such copy is actually filed before the motion to dismiss is made. *Garratt v. Litchfield*, 10 Mich. 451; *Beebe v. Young*, 13 Id. 221; *Babcock v. Twist*, 16 Id. 282.

We are disposed to give statutes allowing appeals a liberal construction, where that can be done without

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extending the letter of the statute, which we do not claim the right to do. With this purpose we shall hold that an appeal properly claimed, perfected, and allowed in the probate court ought not to be dismissed for a failure to file the record in the circuit court within the 30 days, provided the same should be filed before the motion to dismiss is actually heard.

I am willing to base the decision of this motion on this ground. It is not clear that the action of the circuit judge might not be justified also under How. Stat. §§ 5948, 6784. Some of my brethren think, in this case, relator waived his right to move to dismiss the appeal, because, on the calling of the docket on the first day of the term, he did not state clearly his objections to having the case heard; his statement that the case was not properly on the docket for trial being calculated, it is said to lead the appellants and the court to suppose that his objections related only to a want of notice of trial. It is urged with much force that, if he had stated at that time that the appeal had not been taken and perfected by the filing of the record, further time might have been applied for, and perhaps allowed, within the ten days. There is force in this, as applied to this particular case. Slight evidence of waiver has been held sufficient when no substantial rights are to be lost by it. *Lyon v. Insurance Co.*, 55 Mich. 142, and cases cited.

The other Justices concurred.

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PATRICK FITZSIMONS v. MARTIN FOLEY.

Partnership—Accounting—Purchase of real estate by one partner—Trust.

1. Where, for nearly 25 years, a partnership business was carried on without written accounts as between the partners, the evidence of their dealings resting in parol, during which time each one drew from the business as his needs required, without question or protest from his partners, the safest and most equitable course is to leave the partners as they left themselves at time of the practical dissolution of the firm at the expiration of said term of years.
2. At an execution sale to satisfy a judgment owned by a partnership, one of the *three* partners bid in the land in his own name, and assumed to apply the purchase price on the judgment. He received the usual sheriff's deed, and about a year and a half afterwards the other partners deeded their interest in the land to a third party, who filed a bill to compel a conveyance to him by the other partner of an undivided two-thirds of the land, and secured a decree for such conveyance, subject to the defendant's rights on a final settlement between the partners, should an accounting be thereafter had between them. The theory of the bill was that the action of the defendant was unknown to his partners, he concealing it from them until after the dissolution of the partnership, and that they *each* had an equitable estate in an undivided third of the land. The defendant's claim was that the firm received more than the price the land sold for from him many years before, which money was never repaid or drawn out by him, and that he used so much of the judgment as he did in preference to drawing the money from the firm business, as less liable to injure the firm, and that his action was in harmony with the general practice of each partner. He denied that any dissolution had ever taken place, except as the firm ceased to do business, or that any settlement or accounting had ever been had between the partners. On a review of the testimony the defendant's version is found to be correct, and the decree is reversed and the bill dismissed.

Appeal from Houghton. (Williams, J.) Argued April 24, 1890. Decided May 9, 1890.

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Bill to declare a resulting trust in land, and for a conveyance, etc. Defendant appeals from a decree granting the relief prayed for. Reversed and bill dismissed. The facts are stated in the opinion.

Stone & Gray, for complainant, contended:

1. The testimony shows that the defendant took the conveyance in his own name in fraud of the rights of his partners, and a trust resulted in their favor; citing How. Stat. § 5571; *Fisher v. Fobes*, 22 Mich. 454; *Linsley v. Sinclair*, 24 Id. 380; *Ransom v. Ransom*, 31 Id. 301; *Terry v. Tuttle*, 24 Id. 206; *Hooker v. Axford*, 33 Id. 453; Perry, Tr. §§ 127, 169.
2. It clearly appears that the lot was bought in to collect a debt, and not for partnership use or purposes; hence there is a resulting trust in favor of the partners of the purchaser, without regard to the state of the partnership accounts; citing *Coder v. Huling*, 27 Penn. St. 84; Story, Part. § 93, and cases cited in note; *Whaling Co. v. Borden*, 10 Cush. 458.

J. B. Humphrey, of counsel, for complainant.

Ball & Hanscom, for defendant, contended:

1. The evidence does not show any trust resulting in favor of the defendant's partners, which is claimed to arise by reason of his fraud. If the transaction can be accounted for consistently with honesty of purpose on the part of the defendant, no fraud should be imputed to him; citing *Pierce v. Pierce*, 55 Mich. 637; *Campau v. Lafferty*, 50 Id. 114, 117.
2. Complainant can obtain no relief in a suit of this kind until after the partnership affairs are settled, and it is ascertained that all of the debts can be paid, and the accounts of the copartners adjusted among themselves, without disposing of this land; citing *Moran v. Palmer*, 13 Mich. 377; *Buchan v. Sumner*, 2 Barb. Ch. 165 (47 Am. Dec. 305); *Arnold v. Wainwright*, 6 Minn. 358; *Erwin's Appeal*, 39 Penn. St. 535; *Roberts v. McCarty*, 9 Ind. 16; *Hutchinson v. Dubois*, 45 Mich. 143; *Sirrine v. Briggs*, 31 Id. 443; *Dupuy v. Leavenworth*, 17 Cal. 267, 268; *Miller v. Brigham*, 50 Id. 615; *Simpson v. Leech*, 86 Ill. 286; *Bopp v. Fox*, 63 Id. 540.

MORSE, J. The bill in this cause was filed to obtain the title to the undivided two-thirds of a lot of land in the village of Red Jacket. The undisputed facts as to

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the purchase of this lot by the defendant, who holds the legal title, are these:

In 1884, the defendant, his brother John Foley, and Michael Smith, a brother-in-law to the Foleys, were copartners in business under the firm name of Foley Bros. & Co. Susan G. McDonald owed the firm a debt of over $1,500. A judgment was obtained against her, execution levied on this lot, and the same sold and bid in, in the name of the defendant, for the sum of $1,000. No money was paid upon the sale, but the $1,000 was applied on the judgment as part payment. This sale ripened into a sheriff's deed of the land to defendant, February 24, 1886.

The bill claims that the lot was bid in by the defendant, and the deed taken in his name, without the knowledge or consent of John Foley and Michael Smith, and with an intention on the part of defendant to cheat and defraud them; that the copartners Smith and John Foley were kept in ignorance of the true state of the title until after the dissolution of the copartnership. It is contended that the purchase of said premises, under the circumstances, gave the said John Foley and Michael Smith an equitable estate therein of one undivided one-third each, and that the defendant holds the legal title of such interest in trust for the complainant, who is grantee of said John Foley and Michael Smith, by virtue of a deed bearing date July 26, 1887, for which he gave a valuable consideration.

The defendant claims that he virtually bought this land with his own money, and the whole of the same is equitably his. He says that in October, 1880, he received $1,400 from the sale of lands that belonged to him individually; that this sum he deposited to the credit of the firm, and it was used for their benefit; that such sum was never drawn out of the firm by him, except that,

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when the sale was made of this lot upon the execution, he decided to purchase it for himself, and, instead of drawing out his money from the firm's funds for that purpose, he used so much of the judgment against Mrs. McDonald as was necessary for that purpose, $1,000, because it would be less injurious to the business of the firm to get his pay in that way, instead of taking out his money; that the transaction was entirely in accordance with the practice of all the partners in carrying on their business.

He denies that there was any understanding that the lot in question was to be bid in for the benefit of the firm, or that the other copartners had or are entitled to any interest, legal or equitable, in said lot. He denies that there was ever any dissolution of the copartnership, except as they ceased to do business, or that any settlement or adjustment has ever been had between the copartners concerning the partnership business, or that he is indebted to the copartnership as charged in complainant's bill; but alleges that, on a settlement, the firm would be found indebted to him in a large amount.

The proofs were taken by stipulation before a circuit court commissioner and by interrogatories, and upon hearing and argument the circuit judge, Hon. William D. Williams, decreed that the complainant was entitled to have conveyed to him the undivided two-thirds of the lot, and directed the defendant to convey such interest to him, subject to the rights of said defendant, Martin Foley, in the same, as partnership property of Foley Bros. & Co., on final settlement between the partners composing such firm, "should an accounting be had hereafter." From this decree the defendant appeals.

We are satisfied that the defendant's version of the transaction is correct. The undisputed testimony shows that in 1860, and before that, the defendant and his two

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brothers, John and Michael Foley, were engaged in the saloon business at Eagle Harbor, and also at Houghton. In 1861 the firm engaged in butchering at Eagle Harbor, and gave Michael Smith a quarter interest in the same. Soon afterwards the firm of Foley Bros. & Co. was organized, consisting of the three Foley brothers and Smith. The firm engaged in a general mercantile business in Eagle Harbor in 1862, in 1867 at Houghton, and afterwards at Red Jacket and Duluth, building stores at some of the places. In 1875 the store at Houghton burned down, and business ceased at that place. In 1876, Michael Foley died. No change was made in the business after his death, and his widow seems to have been supported out of it, or partially so, until the firm ceased to do business. When the firm of Foley Bros. & Co. was created, all the copartners were married, and had families, except defendant. He was married in 1872. The firm became embarrassed in 1884, and the Red Jacket store was closed out under chattel mortgages. The whole business was discontinued in 1885; John Foley and Michael Smith selling out the Eagle Harbor store and stock to their sons, who went into business under the firm name of Foley & Smith. Foley & Smith assumed part of the indebtedness of the old firm, and all the claims against Foley Bros. & Co. have been paid or settled, except, perhaps, a few small debts. There never was any settlement or accounting between any of the members of the old firm; and from the commencement of the saloon business up to the discontinuance of the mercantile business, in 1885, each partner drew out of the firm, without reserve, whatever goods or money he wanted for living expenses or anything else, and there was no account kept of it. Money was drawn out by all the partners in small amounts, at different times, and invested in land and other property on individual account.

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It is clear that the defendant deposited his own money, as he claims, in the name of the firm; and it is equally clear that he took the title to this land without serious objection on the part of John Foley and Michael Smith, and that they never intended, until complainant interfered, to contest such title with him, or claim any interest in the land. John Foley testifies that he knew the lot had been bid in by defendant, but not until after the sheriff's deed had been issued. He learned of the levy of the execution before that time. He says:

"No objection was raised by me, for the reason that I did not know of the fact until long after our business relations had ceased. I have never asked him to convey a part of said lot to me."

Smith testifies substantially the same. Both of them also swear that, during all the time of the copartnership, down to the last moment of its existence, each copartner drew money and goods from the business for his own living and his own purposes, from time to time, as he needed, and no account was kept of such money, goods, and other things drawn out of the several stores by the several partners for their living or for their private purposes.

It was claimed by defendant that, under this common and brotherly using of the property of the firm when needed or desired, for the benefit of each individual member, without any account or reckoning kept between them, the others drew out a great deal more than he did, as he was for a long time a single man, with less wants and necessities than those who were married, and had families to support; and that, if an accounting could be had, it would show the firm largely indebted to him for this reason. In this regard Smith and John Foley testify that in their judgment defendant drew out more than they did, but that they have no accounts by which they

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can show whether he did or not. As all of the members of the firm of Foley Bros. & Co. swear that they never attempted to keep accurate accounts between themselves, and as it is evident that a just accounting could not now be had between them of nearly 25 years of business, a business carried on, as between themselves, with no written accounts, and the evidence of their dealings therefor resting in parol, we think the safest and most equitable course is to leave the copartners of this firm as they left themselves at the practical dissolution of the firm, in 1885. Each one seems to have kept what he had drawn out without question or protest from the others.

John Foley and Smith testify that they never made any claim upon defendant for any share in this land. Their excuse is that when they found out he had taken the title in his own name it was to late to do so. They knew of it when the deed was issued, February 24, 1886. They did not deed their interest to complainant until July 26, 1887, nearly a year and a half afterwards. If, during this time, they considered that the defendant, Martin Foley, had committed a fraud upon them in thus taking the title in himself, it seems strange that they did not in some way make known to him that they claimed or thought they ought to have some interest in this land. The defendant testifies that he told Smith about it, and that he made no objection. The defendant's theory is the most consistent with the actions of the parties, as their acts appear from the undisputed facts, and the decree of the court below will therefore be reversed and set aside.

A decree will be entered here dismissing the bill of complaint, with costs of both courts to defendant.

CHAMPLIN, C. J., LONG and CAHILL, JJ., concurred. GRANT, J., did not sit.

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GEORGE KERN v. FREDERICK MYLL.

80 525
94 478
80 525
141 214

Landlord and tenant—Nuisance.

1. A declaration which sets up the construction and continuance of a *nuisance* by the defendant upon his own land, which the plaintiff went into possession of as a tenant, to the injury of the plaintiff, the existence and cause of which were unknown to the plaintiff, but were known to, and concealed from the plaintiff by, the defendant, discloses a cause of action in tort, resting upon the duty of the defendant to disclose to the plaintiff defects in the (leased) premises amounting to nuisances, known to defendant and concealed from plaintiff, and which were calculated to impair, and which did impair, the health of the plaintiff
2. The declaration in this case is held to disclose a cause of action which does not rest upon any covenant, express or implied, of the landlord to repair the premises, nor that they were habitable at the time the lease was made, nor necessarily upon the relation of landlord and tenant, although the lease is set up by way of inducement, to show the right of plaintiff to the possession of the premises,—but one based upon the maxim that every person must so use his own premises as not to injure others, either in person or property, rightfully in the vicinity.

Error to Wayne. (Gartner, J.) Argued April 24, 1890. Decided May 9, 1890.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

George X. M. Collier, for appellant, contended:

1. The objection to the admission of evidence on the ground that the declaration is "insufficient and inartificial and uncertain" is not well taken; citing *Jennison v. Haire*, 29 Mich. 210; *Hathaway v. Sackett*, 32 Id. 103; *Aldrich v. Chubb*, 35 Id. 359.

William Look and *H. F. Chipman*, for defendant, contended:

1. The declaration should set forth specifically, for the benefit and

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information of the court and of the defendant, just what duty it is claimed has been neglected, and must further show in what respect the defendant has been negligent; citing *Batterson v. Railway Co.*, 49 Mich. 186, 187; *Klanowski v. Railway Co.*, 57 Id. 539; *Railroad Co. v. Marcott*, 41 Id. 435; *Railway Co. v. Stark*, 38 Id. 717, 720; *Addison v. Railway Co.*, 48 Id. 155.

CHAMPLIN, C. J. The court directed a verdict for the defendant on the ground that the plaintiff's declaration did not disclose a cause of action.

There are two counts in the declaration. The first sets out that on May 1, 1885, and from thence to the commencement of suit, Kern was possessed, by virtue of a lease-hold interest, of a certain dwelling-house, grocery store, and saloon in the city of Detroit, at Nos. 219, 221, and 223 Croghan street, wherein his family dwelt, and he did business; that the defendant, Myll, was the owner, proprietor, and landlord of the premises, and as such ought to have built a dwelling that human beings could dwell in without injury to their lives and health, and with a proper and customary drainage required upon premises of like character in a large city, and ought to have caused to be properly filled in with solid earth one certain well upon said premises before placing said building upon said premises, and ought to have caused to be built the necessary drains to carry away the surface water, in order to have said premises a fit place for human beings to inhabit without danger to their lives or health.

"Nevertheless the said defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode, annoy, and cause said plaintiff and his family to contract serious diseases, and to become ill and die, in the possession, use, occupation, and enjoyment of said dwelling-house, grocery store, and saloon, with the appurtenances, heretofore, to wit, from the 1st day of May, 1885, up to the time of commencing

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this suit, and for a long space of time hitherto; and more particularly said defendant, on or about ten years before the commencement of this suit, in the county aforesaid, * * * wrongfully and unjustly suffered, permitted, and caused to be built an addition upon said premises, covering a portion of the ground thereof upon which was an open well containing a large quantity of water, and said defendant, before the erecting of the building over said premises, caused said well to be partially filled with rubbish and refuse matter, leaving a large quantity of water remaining in said well undrained, and with no provisions that the water should be drawn off from said open well, which then operated as a cess-pool for the entire premises, and then erected the said addition to the building upon said premises by placing the joists upon the earth, without any excavations or drains whatever, immediately over said open well or cess-pool, and suffered and permitted the said open well or cess-pool, filled with all manner of rubbish, and containing a large quantity of water, to be and continue up to the time, to wit, on the 1st day of May, A. D. 1885, when the said defendant leased said premises to said plaintiff from month to month, with rent payable monthly in advance, at the rate of $40 per month, and at the same time not in any manner disclosing to said plaintiff the concealed source of danger to life and health of the said plaintiff and his family, known by him, the said defendant, to be such, and not discoverable by the said plaintiff, the tenant, the said cess-pool or open well being securely covered up by the floor in said house, and the said plaintiff having no knowledge, or means of knowing, that there was concealed a source of great danger to life and health under and beneath the said building upon said premises; and said defendant wrongfully and unjustly suffered and permitted the said open well or cess-pool to be and continue, and the same during all that time, that is to say, from the first of May, A. D. 1885, up to the time of the commencement of this suit, for want of needful and necessary reparation thereof; and by means thereof, on the day and year aforesaid, and on divers days and times during that time before and after the renting of the said premises by said plaintiff from said defendant, divers large quantities of excrement, filth, dead rats, and other vermin were collected in said cess-pool or well unto and into said premises as aforesaid, and stayed, con-

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tinued, and remained therein during all the time aforesaid.

"And also, thereby, divers noisom, noxious, offensive, unwholesome, unhealthy, and poisonous smells, vapors, stenches, during the time aforesaid, ascended and permeated the said grocery store, saloon, dining-room, sitting-room, and all of the sleeping apartments, upon the said premises as aforesaid; and on those several days and times there greatly annoyed, incommoded the said plaintiff and his family, and caused the said plaintiff and his family to contract serious diseases, and become sick, sore, and lame, and contract serious diseases which will remain a permanent and lasting injury to the said plaintiff and his family during their natural lives, in their said habitation of the said dwelling-house, grocery store, and saloon of the said plaintiff. And also, by means of the premises, the plaintiff lost his child, Barbara K. Kern, who died from disease caused and produced by the noxious and deadly fumes and odors arising from said cess-pool or well.

"And also, by means of the premises, the said plaintiff hath been and is hindered and prevented from exercising and carrying on his trade and business of a grocer and saloon-keeper in so beneficial a manner as he, before the committing of the said grievances by the said defendant, had been used and accustomed to do, and would have continued to do, and hath thereby been deprived of divers great gains and profits which he otherwise might and would have derived and acquired, to wit, in the county of Wayne, at 219, 221, 223 Croghan street, in the city of Detroit, aforesaid, by reason of the loss of time of said plaintiff and his wife, caused by the illness directly produced by the divers noisome, noxious, offensive, and poisonous stenches arising from said cess-pool or open well, as aforesaid, and by the driving away of the patrons and customers of the said plaintiff by reason of said smells, vapors, and stenches.

"And also, by means of the premises, the said plaintiff hath been compelled to pay out in expense large sums of money, in paying doctors' bills for the attendance upon the plaintiff and his family during their illness caused by said cess-poll or open well, a large sum of money, to wit, the sum of five hundred dollars. And also, by means of the premises, the said plaintiff hath been subjected to a great expense in hiring nurses to attend to and watch the plaintiff and his said family in their illness caused by said

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cess-pool or open well to a large amount, to wit, the sum of five hundred dollars. Therefore, the said plaintiff says that he is injured, and has sustained damage, to the amount of ten thousand dollars.

"SECOND COUNT.

"And whereas, also, the said plaintiff, being so possessed of his dwelling-house, grocery store, and saloon, with the appurtenances aforesaid, the said defendant, before and at the time of the committing of grievances hereinafter mentioned, was the owner and proprietor of the said premises Nos. 219, 221, 223 Croghan street, upon which was the said cess-poll or open well under the said dwelling, grocery store, and saloon of the said plaintiff, and by reason thereof the said defendant, before and at the time of the committing the grievance by the said defendant as hereinafter mentioned, ought not to have filled said well with rubbish, and erected said dwelling upon the same, but ought to have torn down said well, and filled the same with solid earth, and prevented the drowning of rats in said well or cess-pool, and prevented the excrement, filth, water, and dead vermin, from time to time, being in the said cess-pool or open well, and to have prevented thereby divers noxious, noisome, offensive, unwholesome, and poisonous smells, vapors, and stenches from proceeding therefrom unto and into, and permeating through, the entire dwelling-house, grocery store, and saloon, with the appurtenances, of the said plaintiff, to wit, in the county of Wayne, at Nos. 219, 221, 223, Croghan street, in the city of Detroit.

"Nevertheless the said defendant, well knowing the said last-mentioned premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode, make sick, and kill him, the said plaintiff, and his family, in the possession, use, occupation, and enjoyment of his dwelling-house, grocery, and saloon, with the appurtenances, heretofore, to wit, on the 1st day of May, A. D. 1885, and on divers other days and times between that day and the day of the commencement of this suit, to wit, in the county of Wayne, at Nos. 219, 221, 223, Croghan street, in the city of Detroit, aforesaid, wrongfully and unjustly suffered, permitted, concealed, and refused to disclose the source of danger well known by said defendant, and

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caused by him, by neglecting to fill up said well, and the same not being discoverable by the said plaintiff, and the said plaintiff having no knowledge of the existence of the said source of danger to the health and life of the plaintiff and his family, permitted and caused divers large quantities of dead rats and other vermin, decayed wood and rubbish, and large quantities of filth and water, to remain in said last-mentioned cess-pool, or open well, from which whereby divers noisome, noxious, offensive, unwholesome, and poisonous smells, vapors, and stenches, during all the time aforesaid, ascended and came onto and into, and permeated into, every part of the entire premises of the said plaintiff, as aforesaid, and on those several days and times, thereby sowing seeds of disease and death in the body of the plaintiff and his said family, and also thereby causing the death of his child as aforesaid, and the expenditures for nurses and doctors, and lost time of the plaintiff and his wife aforesaid.

"Therefore the said plaintiff says that he is injured, and has sustained damage, to the amount of ten thousand dollars."

When this cause was heard, we intimated that we only desired argument upon the point whether it was necessary for the plaintiff to allege that defendant had notice or knowledge of the noxious odors, and had neglected or refused to remove them, or disclose their cause. Upon further consideration of the declaration, we are of opinion that it discloses a cause of action. The cause alleged does not rest upon any covenant, express or implied, of the landlord to repair the premises, nor that they were habitable at the time the lease was made; nor does it rest, necessarily, upon the relation of landlord and tenant, although the lease is set up by way of inducement, to show the right of plaintiff to possession of the premises. But the cause of action is based upon the maxim that every person must so use his own premises as not to injure others, either in person or property, rightfully in the vicinity. The declaration sets up the construction

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and continuance of a nuisance by the defendant upon his own land to the injury of the plaintiff, the existence and cause of which were unknown to the plaintiff, and were known to, but were concealed from him by, defendant. It discloses a cause of action in tort, resting upon the duty of the defendant to disclose to the plaintiff defects in the premises amounting to nuisances, known to defendant and concealed from plaintiff, which were calculated to impair, and did impair, the health of the plaintiff. Wood, Landl. & Ten. (1st ed.) § 384; *Minor v. Sharon*, 112 Mass. 477; *Scott v. Simons*, 54 N. H. 426. How well the plaintiff may be able upon the trial to connect the cause with the consequences alleged is not involved in the inquiry before us.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

JOHN H. SHOULER v. BADA C. BONANDER ET AL.

80 531
f118 382
80 531
d126 137

Equity—Mistake—Lost document—Evidence—Trust—Accounting—Reference to commissioner.

1. Parties relying upon parol evidence to establish the contents of a written agreement claimed to be lost should be required to explain fully the circumstances of the loss or destruction of the paper, so as to relieve themselves from any reasonable suspicion of having connived at its loss, and to show its contents by proof that satisfies the mind as to its terms.
2. Where A. and B. purchased adjoining lots, and went into possession before receiving their deeds, which, when executed, by mistake conveyed the lot purchased by A. to B., and *vice versa*, and after the death of B. his heirs filed a bill to correct the mistake, and obtained a decree vesting the title of the lot *purchased* by B. in them, but making no provision for a transfer of the title

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to the lot purchased by A. to the owner, the heirs will thereafter hold such title in trust for A. or those claiming under him.

3. A demand for the examination of witness in open court does not deprive the court of the right to direct an accounting before a commissioner in a proper case; citing *Stebbins v. Circuit Judge*, 27 Mich. 170.

4. This case presents the single question of the right of the complainant to redeem from a mortgage, or whether such right has been cut off by conveyances made by his grantor, and involves questions of fact purely; and the testimony is held to satisfy the Court that such right exists, and the decree below is affirmed.

Appeal from Delta. (Grant, J.) Argued April 24, 1890. Decided May 9, 1890.

Bill to redeem mortgaged premises, and to recover rents and profits. Defendants Catrina Becker and Eric E. and Ida K. Wickstrom appeal from a decree granting the relief prayed for. Decree affirmed. The facts are stated in the opinion.

F. O. Clark, for complainant.

F. D. Mead (*E. C. Chapin*, of counsel), for appellants.

CAHILL, J. The bill in this case was filed to redeem the west half of lot 9, block 56, in the village of Escanaba, from a mortgage executed by John Wickstrom to his brother, Israel Wickstrom, now deceased, and to recover from the heirs and personal representatives of the mortgagee in possession any balance of the rents and profits of the mortgaged premises in their hands after the payment of the mortgage debt. This mortgage was given in 1873 for $700.

The facts and circumstances upon which his right to redeem depend, if at all, are somewhat complicated. In 1872 John Wickstrom and Andrew Bonander, arriving together in this country from Sweden, and being unfa-

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miliar with our language and customs, purchased two adjoining lots in Escanaba; Wickstrom lot 9, and Bonander, lot 10, of block 56. They each built upon their respective lots and went into possession before receiving their deeds. When the deeds came to be drawn, a mistake was made by the conveyancer, so that Bonander received a deed for Wickstrom's lot, and Wickstrom received a deed for Bonander's lot. This mistake was not discovered until sometime in 1875. In the meantime John Wickstrom had executed a mortgage to Israel Wickstrom for $700 on lot 10, intending and supposing that he was mortgaging lot 9, and in 1874 he executed another mortgage to some parties in Milwaukee for $436.70 upon lot 10, but supposing he was mortgaging lot 9. Soon after this second mortgage was executed, the mistake in the deeds was discovered, and negotiations were had between Bonander and John Wickstrom for its correction. Nothing definite ever came of these negotiations, because Bonander was unwilling to complete the transfer unless the two mortgages executed by John Wickstrom by mistake on lot 10 could be discharged, or transferred to lot 9.

In 1877 John Wickstrom removed to Chicago. Before doing so he executed a deed to Christian Oleson, a friend living in Escanaba, of lot 10. There was no consideration for this deed. It is claimed that the purpose of executing it was to enable Oleson to make the transfer of the title to Bonander, whenever the mortgages could be discharged. There was, at this time, on the west half of lot 9 a building, erected by John Wickstrom, and used by him as a saloon and boarding house. Before leaving for Chicago, John made some arrangement with Israel, his brother, in relation to the west half of lot 9 and the saloon and boarding house, the exact nature of which is in dispute. The defendant Catrina Becker,

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who is the widow of Israel Wickstrom, claims that John executed a written agreement amounting to a transfer of the title, while the complainant, who claims through John Wickstrom, insists that the arrangement made at that time consisted of a sale of certain personal property, furniture, and fixtures, and the right to collect the rents during his absence, and apply them upon the mortgage which Israel held.

No written instrument was produced. It is claimed to have been lost or destroyed, and an attempt was made to prove its contents by several witnesses. The effort to prove such an agreement fails. Catrina Becker says she understood that the agreement was drawn up by Mr. E. P. Royce, an attorney at Escanaba, but Mr. Royce, when called as a witness, denies that he ever drew up such an agreement. The other witnesses who were called to prove its contents do not claim ever to have read the agreement, but say they could not read English at that time. They rely upon statements made to them by Israel Wickstrom in the presence of John Wickstrom as to what the paper contained. The parties all agree that a contract was drawn up between John and Israel just before John left for Chicago. Mr. Royce says that he prepared it, and that it was executed, but that it was a bill of sale of the furniture in the house, and that the land was not included. The testimony of the other witnesses does not satisfy us that the agreement executed included the land.

The proof of the loss of the instrument is also unsatisfactory. When parties rely upon parol evidence to establish the contents of a written agreement claimed to be lost, they should be required to explain fully the circumstances of the loss or destruction of the paper, so as to relieve themselves from any reasonable suspicion of having connived at its loss, and to show its contents by proof that satisfies the mind as to its terms.

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"No vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily." *Tayloe v. Riggs*, 1 Pet. 600; *Richardson v. Robbins*, 124 Mass. 105.

In November, 1880, Israel Wickstrom died, and his widow, Catrina, was appointed administratrix of his estate August 11, 1881. She afterwards married Charles Becker. In October, 1881, John Wickstrom gave Catrina Wickstrom a quitclaim deed of the west half of lot 9, running to her as administratrix of the estate of Israel Wickstrom. It is claimed by defendant Catrina (now Becker) that this deed was given for the purpose of carrying into effect the written agreement made between John and Israel in 1877, just before John left for Chicago. The complainant claims that this deed was intended simply as a power of attorney to enable Catrina to collect the rents from the property, and as evidence of this reference is made to a letter written by Catrina to John, transmitting this deed to him to be executed, in which she refers to the instrument inclosed as a power of attorney.

It is conceded that from 1877 down to the commencement of this suit Israel Wickstrom, in his life-time, and his widow, since his death, have been in possession of the premises, and in receipt of the rents and profits derived therefrom. The mistakes in the deeds of Andrew Bonander and John Wickstrom remained uncorrected until 1887. In the mean time Andrew had died. In 1887 a bill was filed by Peter M. Peterson, as guardian of Anna and Bada C. Bonander, the minor children of Andrew Bonander, deceased, against Catrina Becker, the widow of Israel Wickstrom, her husband, Charles Becker, and the holders of the Milwaukee mortgage given by John Wickstrom, for the purpose of correcting the mistake in the deed of lot 10, praying for a decree that said lot 10

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be decreed to be the property of the heirs of Andrew Bonander. Upon a hearing a decree was so made, and the title of the said lot 10 decreed to be in the heirs of Andrew Bonander free of the mortgages executed by John Wickstrom. No provision was made in this decree for putting the title of lot 9 in John Wickstrom or his grantees, but it is claimed that the effect of this decree must be to charge the heirs of Andrew Bonander as trustees of the title to lot 9, holding the same for the true owner. This is undoubtedly correct.

In February, 1875, complainant purchased of John Wickstrom the east half of lot 9 for $400. On February 15, 1887, he purchased from him all his remaining right, title, and interest in lot 9. The consideration for this last purchase was $1,500, $300 of which was paid down, and the balance was secured by mortgage on the property, payable when the title should be made good. Complainant also took an assignment from said John Wickstrom of all his right, title, and interest in the rents collected by Catrina and Charles Becker from the property over and above the amount necessary to pay the Israel Wickstrom mortgage. By virtue of these purchases, complainant claims that he is the absolute owner of lot 9; that he is entitled to an accounting from Catrina Becker as to the rents collected, and to have the title held in trust by the heirs of Andrew Bonander, deceased, conveyed to him, and also any title held by Catrina Becker.

The complainant's right to the decree prayed for depends altogether upon the effect that is to be given to the deed executed by John Wickstrom to Catrina Wickstrom in October, 1881. If, as is claimed by complainant, that deed was not intended to convey the title, but was intended simply to aid the grantee named in it to the collection of the rents, so that they might be applied

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upon the mortgage which she held upon this property, then no title would pass by such deed. But if, on the other hand, as is claimed by Mrs. Becker, the deed given to her in 1881 was intended to convey the title, and was in pursuance of the arrangement made between her husband and John in 1877, then the complainant's bill cannot be sustained.

In support of these conflicting claims a mass of testimony has been taken on both sides, and our attention is called to various facts and circumstances tending to support each position. The circuit judge who tried the case found the facts to be substantially as claimed by complainant, and directed a decree to be entered in accordance with the prayer of the bill, viz:

1. That complainant was the owner of lot 9, block 56.
2. That the heirs of Andrew Bonander, deceased, held the legal title of said lot in trust for the complainant, and they were required to convey.
3. That the quitclaim deed of the west half of lot 9 from John Wickstrom to Catrina Wickstrom [now Becker] was a power of attorney to collect the rents from the buildings located on said lot, to be applied to the payment of the mortgage given by John Wickstrom to Israel, and that upon the full payment of said mortgage Catrina Becker execute a quitclaim deed of said land to the complainant, as purchaser of the rights of John Wickstrom.
4. That Catrina Becker was the wife of said Israel Wickstrom, and Eric E. Wickstrom and Ida K. Wickstrom were the only children and sole heirs of said Israel Wickstrom and Catrina Becker.
5. A special commissioner was appointed to take proofs as to the amount of rents collected by Israel Wickstrom in his life-time, or by Catrina Becker, their agents or attorneys, to apply upon the mortgage indebtedness of John Wickstrom to Israel, and to take an account of all moneys expended by Israel Wickstrom, his successors, heirs, or assigns, in the necessary repairs and improvements of the property, including taxes or insurance paid thereon, and to state such account, showing the net proceeds or balance now in the hands of Catrina Becker, as

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successor and administratrix of the estate of Israel Wickstrom, deceased.

6. That, upon taking and completing the accounting, if there be anything found to be due to the estate of Israel Wickstrom, deceased, upon the note and mortgage given by said John Wickstrom to said Israel, the complainant should pay the balance thereon; and if it should appear on said accounting that more rents have been collected by Israel Wickstrom or by Catrina Becker, her servants, agents, or attorneys, or by the said Eric E. Wickstrom and Ida K. Wickstrom, as sole heirs, successors, and administratrix of the estate of said Israel Wickstrom, they shall pay such surplus to the complainant, with interest upon the same from the time of the receipt of such surplus.

From this decree the defendants Catrina Becker, Eric E. Wickstrom, and Ida K. Wickstrom appeal.

The single question presented upon the record is whether, under the circumstances, the complainant has the right to redeem from the mortgage given by John Wickstrom to his brother Israel in 1873, or whether the right to redeem has been cut off by any conveyance John Wickstrom has made, either to his brother or to his brother's widow. If the right to redeem be determined, then such right may be allowed upon the payment of the mortgage debt, with interest; and, in determining the amount of the mortgage debt, the amount received by the mortgagee for the rents and profits of the property mortgaged, less the amount expended for repairs, insurance, and taxes, must be considered and treated as payments.

We shall not attempt to review the evidence. It is not as clear and convincing as we could wish, but it satisfies us that the relation of mortgagor and mortgagee, which originally existed between John and Israel Wickstrom, has not been intentionally changed; that neither John Wickstrom nor Catrina Wickstrom supposed, when a deed was made in 1881, that John was parting with his interest in his property. His property was mortgaged,

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and it was important to him to have the rents collected, and applied to the payment of this incumbrance. His ignorance of our language and customs might make him careless of the form of any instrument he might execute, if he understood the purpose of it to be to aid his brother's widow in the collection of the money which was her due. Neither do we think Catrina Wickstrom (now Becker) understood, when she obtained the quitclaim deed, that she was perfecting her title as owner, and giving up her interest as mortgagee, of this property. There are several circumstances that indicate a different understanding:

First. She caused the quitclaim deed to be prepared, and sent it to John to be executed. She knew him to be a married man, yet she did not include his wife as a party to it, as she would have been likely to do if she supposed she was thereby perfecting her title. In her letter transmitting the deed she called it a power of attorney, spoke of litigation she was having over the collection of rent, and urged him to send the deed back at once, so that she might have it for use on the trial of a cause which had been adjourned. She said nothing about her mortgage. This letter was written in the Swedish language. The deed was, of course, in English. It does not appear that John could read English at that time, but it is certain he would understand the letter better than the deed. Many other circumstances appear in the record tending to support complainant's claim. On the whole, it is satisfactorily established.

The decree below secures to the defendants the payment of the debt, together with all expenditures for repairs, taxes, or insurance, with interest. It requires them to credit on such indebtedness the money received by them for rent. If there is a balance their due, complainant is to pay it. If the balance is the other way,

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defendants are to pay it to complainant. This is equitable if the complainant has the right to redeem.

The decree below very properly appointed a special commissioner to take the accounting, and report the same to the court. *Curtiss v. Sheldon,* 47 Mich. 262. A demand for the examination of witnesses in open court does not deprive the court of the right to direct an accounting before a commissioner in a proper case. *Stebbins v. Circuit Judge,* 27 Mich. 170.

The decree of the court below is affirmed, with costs.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. GRANT, J., did not set.

BENJAMIN F. HUGHES, ADMINISTRATOR, v. WILLIAM O. PEALER, GUARDIAN, ETC.

Equity—Mistake of law—Payment.

A wife died, possessed of personal estate, and leaving a son and his step-father as her heirs. Shortly before her death, at the request of the husband, the wife gave directions as to the disposition of her property, but not in such a manner as to be *legally* binding upon her heirs. The husband was appointed administrator of her estate, and disposed of the property according to her directions. He afterwards filed a bill against the guardian of the son, to whom he had delivered the major portion of the property, to secure its return to him as administrator, to be distributed according to law, claiming to have turned it over under a *mistake* as to his *legal rights*, having been advised by the judge of probate that the son was his mother's *sole* heir. On a review of the testimony the Court find that complainant did not act under any misinformation or mistake as to the law, and that ignorance of the law would not afford him relief, even if it existed, and a decree is entered dismissing his bill.

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Appeal from Van Buren. (Buck, J.) Argued April 25, 1890. Decided May 9, 1890.

Bill to compel defendant to return to complainant certain personal property, or its avails, which he turned over as belonging to the ward, under an alleged mistake of law. Defendant appeals. Reversed, and bill dismissed. The facts are stated in the opinion.

James H. Johnson and *Dallas Boudeman*, for complainant, contended:

1. Counsel say, if there was a mistake, it was at best a mistake of law. We submit that complainant's mistake was one of *fact* as to what the law was; perhaps a mistake of both law and fact. Ignorance of law is scarcely susceptible of proof, but a *mistake* of law is, and, when proved, relief may be granted; citing *Hopkins' Ex'rs v. Mazyck*, 1 Hill, Eq. 250; *Champlin v. Laytin*, 1 Edw. Ch. 467; *Boone v. Ridgway's Ex'rs*, 29 N. J. Eq. 543; 3 Wait, Act. & Def. 163; *Harrison v. Stowers*, 1 Miss. 165; and in many instances a mere mistake of law will be relieved against; citing *Willan v. Willan*, 16 Ves. 72; *Bingham v. Bingham*, 1 Ves. Sr. 126; *Pusey v. Desbouvrie*, 3 P. Wms. 320; *Lansdown v. Lansdown*, Mos. 364; *Perrott v. Perrott*, 14 East, 439; *Fitzgerald v. Peck*, 4 Litt. (Ky.) 127; *Clayton v. Freet*, 10 Ohio St. 544; *Remington v. Higgins*, 54 Cal. 620; *Baker v. Massey*, 50 Iowa, 399.
2. Defendant, being an attorney, and seeing complainant about to place in his hands the property in question, was legally bound to apprise him of his rights in the property; citing *Leonard v. Leonard*, 2 Ball & B. 179, 180; *Gordon v. Gordon*, 3 Swanst. 462, 471, 473, 476, 477.
3. It is a well-settled principle of equity that where parties do not stand upon an equal footing, and there is any concealment of facts or withholding of the rights of the party to the transaction, through which the other party suffers wrong, relief will be granted; citing *Stewart v. Stewart*, 6 Clark & F. 911, 966–971; and it is likewise a rule in equity that a mixed mistake of law and fact will be relieved against; citing *Harrell v. De Normandie*, 26 Tex. 120; *Moreland v. Atchison*, 19 Id. 303; *King v. Doolittle*, 1 Head, 77; *Northrop's Ex'rs v. Graves*, 19 Conn. 553; *Evants v. Strode's Adm'r*, 11 Ohio, 480; and a mutual mistake of law or fact is relievable in equity; citing

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Clowes v. Higginson, 1 Ves. & B. 524, 527; *Ramsden v. Hylton*, 2 Ves. Sr. 304; *Farewell v. Coker*, 2 Mer. 353.

4. Where there has been a mistake of only one of the parties, relief is still granted, especially when no consideration has been paid by the other; citing *Diman v. Railroad Co.*, 5 R. I. 130; *Dulany v. Rogers*, 50 Md. 524; *Hearne v. Ins. Co.*, 20 Wall. 488; *Brown v. Lamphear*, 35 Vt. 252, 259.

5. Where a party acts upon the misapprehension that he has no title to the property, it involves in some measure a mistake of fact, that is, of the fact of ownership, arising from a mistake of law, and he may have relief. Complainant supposed he had no interest in his wife's estate, while, as a matter of fact, he did have. A party cannot be said to intend to part with a title if he does not so intend, and a court of equity will grant relief in such cases; citing 1 Story, Eq. Jur. §§ 122, 130; and the true state of the law is always a fact; citing *Champlin v. Laytin*, 6 Paige, 189; *Hall v. Reed*, 2 Barb. Ch. 505; *Tabor v. Ins. Co.*, 44 Mich. 330; 3 Pars. Cont. 398.

Pealer Bros., for defendant, contended:

1. The property, having been received in good faith in satisfaction of an equitable claim, and placed where in conscience it should go (it having passed to the boy's mother by the will of his father, who acquired it, and by her dying wish to the son) cannot be reclaimed; citing *Moore v. Eddowes*, 2 Adol. & E. 135 (note); *Farmer v. Arundel*, 2 Wm. Bl. 824.

2. The general rule is that courts of equity, as well as of law, will not relieve for mistakes of law alone; citing Story, Eq. Jur. §§ 111–116, 126; *Martin v. Hamlin*, 18 Mich. 354; *Ledyard v. Phillips*, 32 Id. 14; *Advertiser & Tribune Co. v. Detroit*, 43 Id. 116; *Wayne Co. v. Randall*, Id. 137; *Lapp v. Lapp*, Id. 287; *Tompkins v. Hollister*, 60 Id. 470.

GRANT, J. Complainant was the husband of Mary A. Hughes, deceased. They were married in August, 1886. She was then a widow, her former husband having been dead about 10 years. She had one child, the issue of her first marriage, whose name was Claude Bunn. She died intestate in April, 1887, eight months after her marriage with complainant, leaving personal property valued at about $3,700. June 27, 1887, complainant was appointed administrator of here estate, and filed an inventory under oath, consisting of six promissory notes, aggregating

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$2,680.51. Aside from these notes, she left $844.56 in cash, a horse, gold watch, robes, a diamond ring, some household furniture, and wearing apparel.

Shortly after her death defendant, Pealer, was appointed guardian of her son. He wrote to complainant stating that he was in need of funds to provide for the proper care and education of his ward, and requested him to turn over the property that belonged to the son. In reply to such letter, complainant, on September 7, 1887, sent to defendant the notes above mentioned, as the property which belonged to him as guardian.

On May 28, 1889, complainant filed this bill, alleging that he turned this property over to defendant because he was advised by the judge of probate of Van Buren county, Hon. O. N. Hilton, that he had no pecuniary interest in his wife's estate; that her son, Claude Bunn, would eventually be entitled to the whole of it, and that he might as well turn the property over to defendant; that he acted solely upon this advice of the judge of probate, and would not have turned the property over if he had supposed that he had any interest in it; that the turning over of said property was a mistake which consisted in the fact that the information so received, and upon which he acted, was incorrect; that shortly before the filing of this bill he ascertained the mistake, demanded a return of the property, and, upon defendant's refusal, commenced this suit to compel the defendant to return the property or its proceeds, if he has collected or changed the securities, to complainant, for distribution under the rule of the probate court.

Answer was filed denying the material allegations in the bill, and asserting that complainant had disposed of the property in accordance with the wishes of Mrs. Hughes expressed to him shortly before she died, and with knowledge of all his rights therein; that his act in

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turning the property over was voluntary; and that he is now estopped from making any claim thereto.

Proofs were taken in open court, and a decree rendered in favor of complainant in accordance with the prayer of the bill, directing the defendant to return to complainant the securities in so far as they were still in existence, and the avails of any that have been collected, and any that have been substituted. The learned circuit judge filed a written opinion, in which he says:

"Upon a careful consideration of all the evidence in the case, and the arguments and briefs of counsel for the respective parties, I am constrained to conclude that the facts proved support the complainant's claim, and that he is entitled to the relief sought by him in this suit. If his testimony is true, his delivery of the securities belonging to his intestate by him to the defendant would not have occurred had it not been for the erroneous advice given complainant by the probate judge, and upon which he relied. Upon this point there is no real conflict in the testimony."

Complainant's case depends entirely upon his own testimony. The judge of probate had left the State, and could not be found. Briefly told, his story is that, shortly before his wife died, he told her that she was very sick, that there was a possibility that she would not get well, and asked her if there were any arrangements she desired to make in case she should die. After speaking of some things, not material here, she said to him:

"From that money you keep $500 for yourself, pay my funeral expenses and expenses of my sickness, and the balance of the money you give to Claude. I want you to have the horse, and there is my gold watch; you take that, and keep it."

He also testified that she spoke of a ring and some articles of furniture which she requested be kept for Claude. Upon her death he carried out her wishes. He kept the $500, the horse, the watch, and also the rest of

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the money; turned over the furniture and ring to relatives of the boy; gave her wearing apparel to her sisters, and her sewing-machine to her mother, which she had evidently requested, as appears from the testimony of others who were present at the conversation. She was sick about two weeks, and he says the expenses of her sickness and the funeral expenses were not much. He has not filed any account as administrator, and retains the balance of the money.

Claude Bunn and her sister, Mrs. Francisco, were present at the conversation. Mrs. Francisco testified that complainant asked his wife what she was going to do with her property, and that she replied as to the specific articles substantially as above stated by complainant, except that she included a harness and robe to him, her apparel to her sisters, and sewing-machine to her mother, and that she then said: "The rest should all go to Claudie." This was conditioned upon her death. This witness further says that he said to her:

"You are very low, and you had better make a statement about the property, so it will be satisfactory among us all."

Claude testified that his mother, after specifying the various articles already referred to, said that the rest of the property and money should be given to him. Mrs. Weinberg, the mother of Mrs. Hughes, testified that complainant told her, shortly after the funeral, that he had got $500, a harness, horse, watch, and robes, and that "the others were Claudie's."

Complainant's version of the alleged mistake is as follows:

"I showed him [the judge of probate] the letter that I had received from Mr. W. O. Pealer, requesting me to send some of the notes there, and I asked him who the property belonged to. He wanted to know how many

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children there were. I told him there was one. He wanted to know if it was personal property. I told him, 'Yes.' He says: 'It belongs to the boy.' I asked him then if it would be proper and right for me to turn over the notes to the guardian of the boy; whether my receipt would be accepted all right in settlement of my account there. He told me, 'Certainly it would;' that it was all proper and right; that it eventually all went to the boy anyway. Under that instruction I went home, and mailed the notes to W. O. Pealer, who receipted for them."

Judge Hilton had been judge of probate nearly seven years at the time of this conversation, and of necessity must have been familiar with the law governing the distribution of the estates of deceased persons. Complainant was a merchant and postmaster in the village where he resided. The law, of which he claims he was ignorant, and about which he says he was misinformed, was upon the statute, and had been there for 20 years.[1]

The circuit judge was correct in his conclusion that the expressed wish of the deceased as to the disposal of her estate cannot be maintained either as a will or as a *donatio causa mortis.* Complainant might have ignored her wish and direction, inventoried and accounted for all the property, and had it distributed according to the statute. It is fair to presume that complainant knew that if there were no statute the mother's property would descend to her son. It is a matter of common knowledge that children inherit the property of their parents. He must be ignorant, indeed, who does not know this. Whatever his motive was in suggesting to his wife that she express what disposition she desired made of her property, in the event of her death, we need not inquire. It is sufficient for this case to know that she gave express directions and that he immediately carried them out, and acquiesced in them.

[1] See How. Stat. § 5847, subd. 7, under which one-half of the residue of the personal property belonged to complainant.

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The first material inquiry is, were these notes included within that direction? We are unembarrassed by any finding of the circuit judge upon this point. The complainant's claim is supported by his own testimony alone. His interest is certainly as great as that of the son, and the testimony of the one is as likely to be influenced by this as is that of the other. Whether he supposed that he had no legal interest in his wife's property, or whether he knew that he had an interest, he was evidently willing, if not anxious, to obtain property to which he either supposed or knew that the law would give him no title. As between him and the son we find nothing that would throw the preponderance of evidence in his favor, especially in view of the fact that it is highly improbable that Mrs. Hughes intended to give to her husband nearly two-thirds of her small estate. But the corroborating testimony above stated leaves us in no doubt upon this point. We cannot reach the conclusion of the circuit judge that complainant acted under a mistake of law. It is almost incredible that one who had been judge of probate for six years, in one of the old and populous counties of the State, and who must have directed the distribution of many estates, should have given complainant the advice claimed. The statement bears its own refutation, for claimant says that the judge wanted to know how many children there were. Why should he ask this, if he did not know that complainant's interest depended upon the number of children?

Under this record we think it clear that complainant did not act under any misinformation or mistake as to the law. In any aspect of the case, he can only be held to have acted in ignorance of the law, but this would afford him no relief. Complainant's claim is not based upon any equity, but upon strict legal right. He does not even offer to do equity by restoring to the estate that

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which he has taken and converted to his own use. He disposed of the property in accordance with his wife's direction, and as natural right directed, except as to that taken by himself. Neither his bill nor the evidence makes a case for the interposition of a court of equity. There was no fraud nor any contract based upon the alleged mistake. The questions involved are purely of law and fact. If he turned over these securities by mistake, a court of law would furnish him an ample remedy to recover them back, or, if converted, their value.

The decree of the court below must be reversed, with costs of both courts, and decree entered in this Court, dismissing the bill.

The other Justices concurred.

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The Board of Education of the City of Detroit v. The Common Council of the City of Detroit.

Schools—Free text-books—Board of education of Detroit—Mandamus.

1. It has never been claimed, so far as we are aware, that school boards have the power to furnish *free* text-books except by virtue of special legislation.
2. The action of the board of education of the city of Detroit in including in its annual estimate a sum for free text-books, in the absence of authority from a majority of the qualified electors as provided by section six of Act No. 147, Laws of 1889, is *absolutely* void.
3. The writ of *mandamus* will not be used to aid in the enforcement of an *illegal* claim.

Mandamus. Submitted April 29, 1890. Denied May 9, 1890.

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Relator applied for *mandamus* to compel respondent to levy a certain sum for free text-books. The facts are stated in the opinion.

W. E. Baubie, for relator.

Henry A. Chaney, for respondent.

GRANT, J. This is a petition for the writ of *mandamus* to compel the respondent to levy its annual estimates of the amount required for the maintenance of the public schools of the city of Detroit during the fiscal year ending June 30, 1891. In the annual report submitted by relator to the respondent, under the heading "For Maintenance," appeared the following item: "Text-books, $15,000." Under the heading "Estimated Receipts," appeared the item, "For maintenance, $308,960"

Section 13, Act No. 331, Laws of 1873, provides that the board of education shall annually make an estimate of the amount of taxes deemed necessary for the ensuing or the current year, for all purposes of expenditure, and shall lay the same before the common council. It is then made the duty of the common council to place upon the tax rolls, and cause to be levied, the amount of such estimated expenditures, excepting for purchase of lots and erection of new buildings, with the necessary outhouses, fixtures, and furniture. The amount of this estimate and tax shall not be less than $4 for every child between the ages of 5 and 20 years, according to the last report on that subject. If such estimate exceeds $5 *per capita*, the council may approve or disapprove of such excess, or any part thereof.

The number of children was 63,009, and the *per capita* tax was fixed by the relator at $308,960, being the item above mentioned, for maintenance. The council, upon receiving the report, passed a resolution fixing and

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adopting the estimates reported by the relator. The council, on the next day after adopting the above resolution, submitted the estimates to the board of estimates of the city, which reduced the *per capita* tax to $298,960. This action by the board of estimates was reported to the council, which adopted it, and ordered the various amounts to be assessed, levied, and collected as approved by the board of estimates. The item of $15,000 was for free text-books, and was rejected by the board of estimates for that reason; but the board added $5,000 for text-books for poor children, though only $2,000 had been required for that purpose the year previous. This $10,000 rejected is the sole source of the contention.

The first contention of the relator is that the board of estimates has no supervisory power over the board of education funds, except that for purchasing lots and erecting school-houses, with the necessary out-buildings, fixtures, and furniture. In this contention it is correct. The board of estimates is limited in its jurisdiction to the several funds mentioned in the city charter. Act No. 488, Local Acts of 1887, chap. 8, § 4. The educational fund is not specified in the charter as among them. Act No. 424, Local Acts of 1889. The only power of this board over this fund is limited to the estimates of the board of education for purchasing lots and erecting school-houses, with the outbuildings, fixtures, and furniture. Over these latter estimates the board of estimates has supervisory control. This is expressly conferred upon it by Act No. 331, Laws of 1873, which is amendatory of "An act relative to free schools in the city of Detroit.

The second contention of relator is that, inasmuch as the amount asked for by it, and reported to the council, was within the five-dollar limit, the only power vested in the council was to order the tax placed upon the tax rolls and levied, regardless of the fact that some of the

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items included in the estimates are illegal. We cannot agree with the relator in this contention. If any of the items are clearly illegal, it is the right, not only, but the duty, of the council, to reject them, and refuse to spread them upon the rolls. The council cannot interfere with the discretion of the board of education, and can only reject such items as are clearly illegal. We do not regard the first resolution of the council, approving the estimates, as final. The final resolution was the one approving the report of the board of estimates, and ordering the amount therein specified to be levied. This resolution was inconsistent with the first, and operated to repeal it. We must therefore determine whether the item for free text-books is legal.

It has never been claimed, so far as we are aware, that school boards had the power to furnish free text-books except by virtue of special legislation. That this has been the common understanding is evidenced by the fact that this power has been specially conferred upon some municipal corporations, and the policy of its general adoption has been discussed in the Legislature, and bills have been introduced for that purpose. Such a bill was passed in 1889. Act No. 147, Laws of 1889. By section 6 of this act, it is provided that school-districts in cities organized under special charters shall be exempt from the provisions of the act unless the boards are authorized to proceed under it by a majority vote of the qualified electors of such districts. No such vote has been obtained, and the relator has taken no steps to submit the question to a vote of the electors. Its action, therefore, in providing for free text-books, was absolutely void. But whether the common council properly exercised its power or not is, in fact, immaterial. The writ of *mandamus* cannot be invoked to assist in the enforcement of a claim which is illegal.

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The writ must be denied, with costs to the respondent.

The other Justices concurred.

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GEORGE CHAPMAN v. GEORGE REMINGTON, IMPLEADED WITH SAMUEL P. CROSS AND W. W. WENBAN.

Bills and notes—Good-faith holder—Consideration—Public policy—Township treasurer—Taxes—Payment.

1. A note taken by a township treasurer in his own name, on the sale of property for taxes, is void in his hands on the ground of public policy. *Turnbull v. Township of Alpena*, 74 Mich. 621.
2. The failure of the holder of township drain orders, on exchanging them with the township treasurer for a note held by him in his individual name (which note was taken by the treasurer on the sale of property for taxes, but of which fact the holder of the orders was ignorant), to make inquiry as to how the treasurer obtained the note, is no evidence of bad faith.
3. A promissory note in the usual form, with nothing written upon it indicating that it was taken in an illegal transaction, is "fair upon its face."
4. The consideration paid for a promissory note need not be in money, in order to have the note come to the purchaser in due course of business.

   So *held*, where a book-keeper in a bank exchanged township drain orders for a promissory note held by the township treasurer.

Error to Van Buren. (Buck, J.) Argued April 30, 1890. Decided May 9, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Mills, Osborn & Goss, for appellant, contended:

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1. The note was void in its inception; citing *Doran v. Phillips*, 47 Mich. 228; *Turnbull v. Township of Alpena*, 74 Id. 621.

2. The drain tax was void, and the treasurer had no warrant for its collection. The sale was not, therefore, a tax sale, and the doctrine of *caveat emptor* has no application. The property might have been replevied as soon as seized; citing Wells, Repl. §§ 236, 237.

3. It is urged that it is no matter to defendant what plaintiff paid for the note. Such is not the law where the original consideration has failed, was illegal, or the note has been diverted to a purpose different from that for which it was intended; citing Rand. Com. Pap. §§ 452, 994.

4. The note being void as between Remington and the town treasurer, plaintiff can recover no more than he actually paid; citing 1 Dan. Neg. Inst. § 757; 1 Edw. Bills, § 518.

5. The presumption of law is that the note was void in plaintiff's hands; citing *Paton v. Coit*, 5 Mich. 505; *Peabody v. McAvoy*, 23 Id. 526; *Conley v. Winsor*, 41 Id. 253; *Bank v. Seymour*, 64 Id. 59; and without proof of the *bona fides* of his purchase plaintiff would be non-suited; citing *Holden v. Cosgrove*, 12 Gray, 216; *Cottle v. Cleaves*, 70 Me. 256; *Clark v. Pease*, 41 N. H. 414.

6. The law throws no shield around municipal orders, nor are they negotiable in the sense of cutting off defenses. The purchaser takes *them* at his peril; citing *Miner v. Vedder*, 66 Mich. 101; *Bank v. Willow Lake School Tp.*, 44 N. W. Rep. 1002.

7. Plaintiff having purchased the note in an agreement contrary to public policy, he has no title on which to sue; citing *Lloyd v. Keach*, 2 Conn. 175; *Newman v. Williams*, 29 Miss. 212; *Sproule v. Merrill*, 29 Me. 260; *Ward v. Doane*, 77 Mich. 328.

Boudeman & Adams, for plaintiff, contended for the doctrine stated in the opinion.

LONG, J. In the year 1888 the drain commissioner laid out and constructed in Geneva township, Van Buren county, a public drain called the "Three Mile Creek Drain." The costs of construction were laid, two-thirds upon the parties benefited, and one-third upon the township of Geneva. The costs of such construction amounted to something over $500. Among others who were assessed

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for such drain was one James Stewart, whose assessment amounted to $183.

For the purpose of paying the contractors and others for the work on the drain, the drain commissioner issued certain drain orders, payable out of that fund on February 1, 1889. The tax was assessed by the supervisor in his assessment roll for the year 1888, and became due and payable in January, 1889. James Stewart refused to pay his tax, and the township treasurer, having the tax roll in his possession, levied thereunder upon certain of Mr. Stewart's personal property, and advertised and sold it at public vendue. The sale was made on January 28, 1889, and the defendant Remington became the purchaser, and gave to Mr. Wenban, township treasurer, the defendant impleaded here, his promissory note indorsed by Samuel P. Cross for the amount of his bid, $191.58.

It appears that the plaintiff was the book-keeper in the West Michigan Savings Bank at Bangor, and on January 18, 1889, held and owned about $149 worth of these orders, and the bank also held for collection an order of $38.12, all drawn by the drain commissioner on this fund. On that day the plaintiff wrote to Mr. Wenban, and asked if he could pay them if he should send them up. These orders were all payable on February 1, 1889. It also appears that Mr. Wenban on January 29, 1889, went to Bangor, and to the bank there, saw the plaintiff, presented the note of Mr. Remington so indorsed by Mr. Cross, and asked the plaintiff if it was good. The plaintiff says:

"I looked it over carefully, and said: 'Yes, it is good.' I knew George Remington and Samuel P. Cross, and always supposed them pecuniarily responsible. They did business at the bank, and were my neighbors; one of them, Mr. Remington, living next door to where I reside. I knew James Stewart, and I had heard previous to that that he was having some difficulty with reference to his

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drain taxes, but I had not heard until after I got the note that any of his property had been sold for drain taxes. Mr. Wenban, after these inquiries, said to me: 'If you can use that note, I will take all the orders you have got against our town.'"

An arrangement was then made between the plaintiff and Mr. Wenban by which the plaintiff took the Remington note, so indorsed by Cross, and Mr. Wenban then also indorsed it, in exchange for the drain orders so held by plaintiff, as well as the order of $38.12, which was owned by Mr. James D. Ferguson. The plaintiff credited Mr. Ferguson for this amount upon the books of the bank, and charged his account with it.

This action is brought against Remington, Cross, and Wenban on this note. On the trial in the court below the plaintiff had verdict and judgment. Defendant Remington brings error. The claim made upon the trial in the court below was that the tax roll held by the township treasurer had no warrant attached, and that all the proceedings for the enforcement of the tax against Stewart were void. It was also claimed that the treasurer of the township, Mr. Wenban, had no lawful authority to take the note of Mr. Remington on the sale of the property of Mr. Stewart for this tax, and that therefore the note was void in the hands of Mr. Wenban on the ground of public policy. It is also contended here that, the note being void on the ground of public policy, the plaintiff could not stand in relation to it as a *bona fide* purchaser. The court below advised the jury that the Stewart tax was void, and the treasurer had no right to proceed to its collection. The court also instructed the jury that the note was void in the hands of Mr. Wenban, and that he could not have maintained an action thereon to enforce its collection. This instruction was correct under the ruling of this Court in *Doran v. Phillips*, 47 Mich. 228, and *Turnbull v. Township of Alpena*, 74 Id. 621.

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The defendant, however, is not complaining of this ruling, but insists that the court should have gone further, and held that the note was also void in the hands of the plaintiff, and that the transfer to him under the circumstances was a transaction in violation of law, so that the note had no binding force in his hands, and upon which he could not maintain his action. Upon this point the court instructed the jury as follows:

"The plaintiff, as I have said, claims to be a *bona fide* holder of this note. If you find the fact to be proven that he bought this note at the time he claims to have bought it, before it was due, that he paid value for it, and that he had at that time no knowledge and no notice that this note had a defense such as is here set up, then he is entitled to recover against the defendant, and the fact that it was void between the other parties could cut no figure in your deliberations, and you should render a verdict for the plaintiff."

It is claimed that this was error, for the reason that the plaintiff did not get the note in the ordinary course of business, but received it in exchange for drain orders which were void, and that he got it from an officer whose duty it was to pay the orders, if they were valid, from the funds in his hands for that purpose. It is also insisted that one of the orders turned out in the exchange did not belong to the plaintiff, and that the court omitted to state to the jury one important element of the relation of *bona fide* holder; that is, that he must have purchased in good faith. Several other suggestions are made by counsel for defendant why the plaintiff did not stand in the position of a *bona fide* holder for value, which we do not deem it material to notice.

The situation of the parties at the time of the transaction by which plaintiff became possessed of the note was, as appears from the record, that plaintiff held and owned drain orders to the amount of about $149, and also had one of Mr. Ferguson for collection of $38 and a little

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over. He had written to the township treasurer about their payment, and he had heard that Mr. Stewart was having some difficulty about his drain taxes. It does not appear, however, that he knew or had ever heard that the note which Mr. Wenban presented to him there was given for the payment of the tax against Mr. Stewart. He was not advised of this fact at the time of taking the note. The orders held by him were of some value. They were indorsed by the parties from whom he had taken them, and there is nothing in the record showing that any one was complaining of this drain tax but Mr. Stewart. Other parties against whom the tax was assessed had paid their taxes on that drain, and that portion assessed against the township had been paid, and the moneys were in the hands of the township treasurer; at least, there is nothing in the record showing that this fund arising from that portion of the drain taxes assessed was not in the hands of the treasurer.

The simple fact, therefore, remains that the plaintiff was exchanging these drain orders to Mr. Wenban, who was at that time township treasurer, for a note which Mr. Wenban held in his individual name.

It cannot be said that this was sufficient to put the plaintiff upon inquiry as to how Mr. Wenban procured the note, and that a failure to make this inquiry was evidence of bad faith. The note was fair upon its face. Counsel for defendant claim that this statement made by the court below that "the note was fair upon its face" was error; that all the circumstances surrounding the transaction, in the execution and the transfer of the note to the plaintiff, were to be taken into consideration, and submitted to the jury, and that it was for the jury to determine whether the note was fair upon its face. This is not the rule. The note was fair upon its face, for

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the reason that it was a promise to pay a certain and definite sum in money, at a time certain, to Mr. Wenban or his order, and there was nothing written upon it indicating that it was taken in an illegal transaction. It was indorsed by Mr. Wenban, and came to the possession of the plaintiff for a valuable consideration. The consideration paid by the plaintiff need not have been in money, in order to have come to him in the due course of business. The circumstances surrounding the transfer to the plaintiff were proper to be shown, as bearing upon the question of the good faith of the purchaser, and were submitted to the jury, but could not properly be considered as a test to the question that the note was fair upon its face.

There was sufficient evidence to go to the jury to sustain the verdict that the plaintiff was a good-faith holder. The note was negotiable and fair upon its face. There was nothing upon its face to notify the plaintiff that it was given in an illegal transaction. To impeach the note in his hands, such facts and circumstances must be shown as would make him guilty of bad faith in taking it. The proper inquiry is, did the party have notice or knowledge, at the time of the transfer, of facts and circumstances which impeach the title as between the antecedent parties to the instrument, as mere carelessness in not making inquiry, unless so gross as to imply bad faith, will not defeat such holder's right to recover. *Davis v. Seeley*, 71 Mich. 209; *Bank v. McClelland*, 19 Col. 608; *Bank v. Young*, 41 N. J. Eq. 531.

There are several other errors assigned, none of which we deem material to notice, being satisfied that the questions of fact were fairly submitted to the jury.

The judgment must be affirmed, with costs.

The other Justices concurred.

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154	661

THE PEOPLE v. HERMAN FOSS.

Criminal law—Assault and battery—Highways—Rights of adjoining land-owner.

It may not be desirable that grass should grow and be harvested in the wrought portion of a country highway, but when the travel has been in a uniform and beaten track, leaving grass to grow and ripen undisturbed upon either side, no one but the abutting land-owner, who owns the fee, has the right to harvest it; and he can not only maintain trespass or trover against any person cutting and taking it away against his will, but he has the right to *protect it* against *wanton* or *malicious* damage or destruction, whether attempted under the guise of travel upon the highway or in some other way.

Exceptions before judgment from St. Clair. (Canfield, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted in justice's court of assault and battery, and in the circuit court on appeal. Conviction reversed, and new trial ordered. The facts are stated in the opinion.

Avery, Jenks & Avery, for respondent, contended for the doctrine stated in the opinion.

B. W. Huston, Attorney General, for the people.

S. L. Merriam, Prosecuting Attorney, for the people, contended:

1. The court correctly stated the law to the jury; citing *Daniels v. Clegg*, 28 Mich. 86; *Pigott v. Engle*, 60 Id. 228; *Macomber v. Nichols*, 34 Id. 216; *Stinson v. City of Gardiner*, 42 Me. 248; *Railroad Co. v Munger*, 5 Denio, 255.

MORSE, J. Defendant was convicted of assault and battery upon one August Stieman in justice's court. Upon appeal to the circuit court for the county of St.

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Clair, he was again convicted by the verdict of a jury. He brings his case to this Court upon exceptions before judgment.

The place of the alleged assault was in a public highway, and, as the defendant claims, upon that portion of the same within the half adjoining his father's lands. The farm of the complainant lies opposite his father's, and on the other side of this highway. There is a ditch running close to the fence on defendant's father's side of the road. Between this ditch and the usually traveled track of the highway there was a strip of grass land, from a rod to a rod and a half in width, extending the whole length of the father's premises. Grass had grown there many years, and, when in condition, had been cut, sometimes by defendant and his father, and occasionally by Stieman. There had been more or less controversy about this grass, which finally culminated in the affray causing this suit.

The defendant lived with his father. On June 15, 1889, Stieman was drawing rails from his fence, on the south side of the road, to his orchard, using the highway for that purpose. He was drawing the rails upon a crotch between three and four feet wide. Stieman, after loading, drove on the north side of the center of the road, outside of the beaten or traveled track, and upon the grass. Defendant was mowing. Stieman claims that he told defendant to get out of the way. The elder Foss was there with a bushel basket and rake, gathering the cut grass into the basket. They acted as if they did not hear Stieman, and he—

"Told his horses to get up, and the boy then went on the north side of the road, and the old man stood on the south side of the road; * * * and as I went by the boy cut my horse on the back side with the scythe with which he had been mowing."

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They had some hard words, and Stieman testifies that, as he was driving on, the defendant came up behind him, and struck him twice on the neck. Stieman was corroborated in his testimony by his son. Defendant testified that Stieman came across the road and drove his team upon him; that he threw his scythe into the fence corner, and shoved the horses back with his hands. Stieman dropped his lines "and hauled off," and said:

"'I will kill you.' When I see he was going to hit me, I pushed him back. I gave him two pushes,—one after the other; and, when he see I was pushing him, he went straight across the road and got a scythe, and came up to me, and hauled off three times, and says: 'I cut you in two.'"

Defendant stepped back out of his way, and finally Stieman went away, with threats of future hurt to defendant. Defendant was supported in his testimony by the evidence of his father. The record also states that other witnesses were produced by the prosecution who gave testimony in corroboration of the facts testified to by Stieman and his son; and the defendant produced other witnesses who gave evidence in corroboration of the facts sworn to by himself and his father.

The excuse of Stieman for driving on the grass was that the road was muddy. He admitted that there was grass on his own side, but claimed that it was not wide enough to drive on. The testimony on the part of the defendant showed that the road was sandy, and, although it had rained two days before, the road was not muddy. The beaten track was somewhat nearer Stieman's fence than it was that of Foss; but it is clear that Stieman drove over on the grass for the express purpose of damaging it, as there was room between the beaten track and the uncut grass to drive upon the sward where the grass had been cut. It is also evident from the record that there

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was bad blood between the parties, growing out of their rights in the highway as claimed by each. It was claimed by Stieman that Foss had pastured his cattle in the road, and that he had forbid it, because they trespassed upon his side of the highway, but that he did not quarrel with Foss about the grass on Foss' side of the road. He admitted, however, that he cut it one year, and pastured it another. Foss and his son testified that Stieman told them that, if they would let him have one swath on their side of the road, he would make them no trouble, and that, when he drove upon the grass, he also purposely stamped it down with his feet.

The defendant's counsel requested that the following instruction be given to the jury, which was refused:

"That the defendant had a legal right to cut the grass on his side of the highway; that the grass there growing belonged to him,—as much so as the grass growing on any other part of his farm,—and, for the purpose of harvesting the grass so growing on his side of the highway, he had a right to be there, in person, for that purpose, either of his own right or as the servant of his father, who appears to be the owner of the land, so long as he did not interfere with the free and ordinary use of the highway for public travel."

And also that defendant had a right to protect the grass, and, in so protecting it from being run over and destroyed by Stieman, he would be justified in using as much force as would be necessary to keep Stieman from destroying it; and, if the jury found that no more force was used than was necessary to protect it, their verdict should be for the defendant. The court was also asked to charge, in substance, that Stieman was a trespasser on that side of the highway, and liable to be put off by the defendant, if no more force was used than was necessary to protect the grass, unless the jury found that it was necessary for Stieman to drive there in order to have the free and customary use of the highway for public travel.

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The circuit judge refused to so charge, and instructed the jury that, as to the question of the right of Stieman to travel where he did in the highway, as a matter of law, a person had a right to travel where he pleased upon any part of the wrought portion of the highway; that it was usual to dig ditches on each side, and throw the earth taken from that, and construct a road-bed, and that the travel is usually between these ditches; and that any person, in traveling along the highway about his business, has the right, absolutely, to go where he pleases, so long as he does not interfere with other persons traveling on the highway.

"I think the public, or any one of the public, has the right to go wherever their judgment might dictate, or their caprice may lead them to go; that, because it happens that the beaten track is in a certain locality, it need not always remain just there, and we know, as a matter of fact, it changes according to the caprice of the public or circumstances, of which I might enumerate many, and one person has a right to commence to change that track as well as another. There may be reasons why a person may desire to go upon grass ground instead of the beaten track; and, whatever the reason may be, I instruct you, as a matter of law, that a person has a right to go where he chooses along that wrought portion of the road. And, if it is a fact that the defendant in this case made an assault upon Mr. Stieman because he persisted in exercising that right, and in driving upon the grass, and struck him, then he is guilty of assault and battery as charged in the complaint."

The point in controversy is thus sharply defined by defendant's requests and the charge of the court above stated. It seems to me a novel and interesting question. It is undisputed that Stieman was driving upon growing grass within the wrought portion of the highway, but outside of the beaten or customary track of wagons, and within that portion of the highway the fee of which was in defendant's father. The defendant was under age, and

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working for his father. The father had the right to this grass not only as against Stieman, but all the world, unless it was necessary to destroy it for the needs of public travel. If Stieman had cut the grass and carried it away, Foss could have sued him in trespass for so doing, or recovered from him in trover the value of the grass thus converted. This is certain, within all the authorities. The fee of the land was in Foss, subject only to the easement of the public to use it for the purpose of a highway. He had the right to use it, and to enjoy the profits of it, in any way not incompatible with the public enjoyment of the right of way. *Woodruff v. Neal*, 28 Conn. 169; *Suffield v. Hathaway*, 44 Id. 521, 527; *Stackpole v. Healy*, 16 Mass. 33; Cooley, Torts, 318; *Holladay v. Marsh*, 3 Wend. 142; *Campau v. Konan*, 39 Mich. 362, 365; *Adams v. Emerson*, 6 Pick. 57; *Clark v. Dasso*, 34 Mich. 86; *People v. O'Brien*, 60 Id. 8, 13; *Elsworth v. Lord*, 40 Minn. 337; *Wolf v. Holton*, 61 Mich. 550, 553; Washb. Easem. (4th ed.) 10; *Coburn v. Ames*, 52 Cal. 385. It is plain enough from this record that the complaining witness, Stieman, drove where he did without necessity, and for the express purpose of destroying the grass.

The question arises whether he had the right, from mere caprice or express malice, to destroy this grass by driving upon it, and stamping it under his own and his horses' feet, because it happened to be between the two ditches, and in a space usually known as the wrought or traveled part of the road, when he would have no right to go and cut and carry it away for his own use. I think not. If the jury had found that Stieman drove on this grass, when it was not necessary, for the purpose of damaging or destroying it, and that all the defendant did was to push the horses off from it, and, when attacked by Stieman for this, did no more than was necessary in order to push him away from him, it would have been

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their duty to have acquitted him. It may not be desirable that grass should grow and be harvested in the wrought portion of the highway, but when, upon a rural or country road, the travel has been in a uniform beaten track, leaving grass to grow and ripen undisturbed upon the sides of such track, no one but the abutting landowner, who owns the fee, has the right to harvest it; and he can not only maintain trespass or trover against any person cutting and taking it away against his will, but he has the right to protect it against wanton or malicious damage or destruction, whether it is attempted to be done under the guise of travel upon the highway or in some other way. In this case the complaining witness could not have destroyed this grass by turning his cattle upon it to pasture it. Neither, in my opinion, could he drive his horses and wagon upon it to trample it under foot, when it was not at all necessary to do so, and while he knew Foss and his son were at work gathering it. The law does not permit or encourage any "dog in the manger" business of this kind.

In *Phifer v. Cox*, 21 Ohio St. 248, the plaintiff brought an action to recover damages for the destruction of a hedge within the limits of a highway. The court held that, so long as the enjoyment of a right of way was unobstructed, there was no reason why the easement of a highway should afford a justification to an individual for the needless destruction of property belonging to the owner of the land merely because it happened to be within the bounds of the road as laid and established. And in *People's Ice Co. v. The Excelsior*, 44 Mich. 233, Judge MARSTON says:

"Ordinarily, it may be said that the entire width of the highway may be used; yet the owner of the land over which it passes may, within the limits thereof, plant trees, set posts, and do such other acts as will add to his con-

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venience or assist in beautifying his premises. He is encouraged in doing this by public sentiment. * * * Public convenience may in time, in particular locations, require the removal of some of these things; and, whenever the necessity arises, and the public authorities request their removal, then the private must give way to the public or paramount right. But, while permitted to remain, no one traveling the highway could willfully injure or destroy them; and, should any one do so, he would justly be held responsible, notwithstanding his plea of a claim of right to travel over any part of the highway."

And at page 234, speaking of the relative rights of the steamer and the riparian proprietor, he says:

"The right of navigation, while paramount, is not exclusive, and cannot be exercised to the unnecessary or wanton destruction of private rights or property, where both can be freely and fairly enjoyed."

So, in this case, while the right of travel upon the highway was paramount, Stieman could not exercise that right, in caprice or wantonly, to destroy the property—the grass,—without any necessity, of Foss, and where both the right of travel and the harvesting and preservation of this grass could be freely and fairly enjoyed.

The circuit court was in error; and the verdict of the jury must be set aside, and a new trial granted the defendant.

The other Justices concurred.

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The People v. William Parrow.

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Criminal law—Burglary—Larceny—Bar to prosecution.

An acquittal under an information charging the respondent with burglary with *intent* to commit the crime of larceny, is not a bar to a subsequent prosecution for the same larceny, charged to have been *actually* committed.

Exceptions before judgment from Alpena. (Kelley, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of larceny. Conviction affirmed and court directed to proceed to judgment. The facts are stated in the opinion.

Turnbull & Dafoe, for respondent, contended:

1. No person, after acquittal on the merits, shall be tried for the same offense; citing Art. 6, § 29, Const. Mich.; How. Stat. § 9070; *People v. Gardner,* 62 Mich. 307; *People v. White,* 68 Id. 648.
2. An acquittal or conviction of the offense of burglary is a bar to a prosecution for larceny forming part of the same transaction; citing *Triplett v. Com.,* 84 Ky. 193; *Jones v. State,* 55 Ga. 625 (1 Amer. Cr. R. 510); *State v. Wiles,* 26 Minn. 381 (2 Amer. Cr. R. 621); *State v. Colgate,* 31 Kan. 511 (5 Amer. Cr. R. 71); *State v. Mikesell,* 70 Iowa, 176; *State v. Cooper,* 13 N. J. Law, 375; and a conviction for burglary bars further prosecution for theft; citing *Howard v. State,* 8 Tex. App. 447; *Miller v. State,* 16 Id. 417.
3. The prosecutor may carve the highest crime out of the transaction, and prosecute for the same, but he can carve but once; citing *Woodford v. People,* 62 N. Y. 128; *State v. Colgate, supra;* and, in civil cases, causes of action cannot be split; citing *Dutton v. Shaw,* 35 Mich. 431.
4. The constitutional provision cited was intended to confer a privilege not existing at common law; citing *People v. Harding,* 53 Mich. 486.
5. The former trial, among other things, determined that the respondent, on the night in question, did not break and enter

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the store with intent to commit the crime of larceny, and these facts he had the right to prove by the former verdict and judgment.

6. An adjudication, when used as an estoppel in another action between the same parties, upon the same claim or demand, is conclusive, not only as to every matter which was received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. When used as an estoppel in an action on another claim or demand, it is conclusive on any material fact, common to both, which was actually controverted, litigated, and determined in the former action, and on those only; citing Abb. Tr. Ev. 828; Big. Estop. 45, 112.

B. W. Huston, Attorney General, and *James McNamara*, Prosecuting Attorney, for the people, contended for the doctrine stated in the opinion, citing the authorities therein cited.

LONG, J. The respondent was convicted in the circuit court for Alpena county of the larceny of $35 in money. The money was taken from a till in the store of Muellerweiss & Co. on May 31, 1889, in the night-time. At the time respondent was arraigned, and before pleading to the information for larceny, his counsel moved to quash the information and discharge the respondent, on the ground that the respondent had been tried and acquitted at the former term of that court of the crime of burglary in breaking and entering the store with intent to commit the crime of larceny of the same money. The information for the burglary was as follows, omitting the title:

"James McNamara, prosecuting attorney for the county of Alpena aforesaid, for and in behalf of the people of the State of Michigan, comes into said court, in the May term thereof, A. D. 1889, and gives it here to understand and be informed that William Parrow, late of the city of Alpena, in the county of Alpena and State of Michigan, heretofore, to wit, on the 30th day of May, in the year one thousand eight hundred and eighty-nine, at

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the city of Alpena, in said Alpena county, about the hour of 12 o'clock in the night-time of said day, with force and arms, at the city aforesaid, the shop of John Muellerweiss, Jr., and Andrew W. Comstock, members comprising the firm of Muellerweiss & Company, there situate, not adjoining to or occupied with a dwelling-house, feloniously did break and enter, with intent the goods and chattels of said Muellerweiss & Company, in the said shop then and there being found, then and there feloniously and burglariously to steal, take, and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The information under which the respondent was tried and convicted in the present case reads as follows, after the title of the court and cause:

"James McNamara, prosecuting attorney for the county of Alpena aforesaid, for and in behalf of the people of the State of Michigan, comes into said court, in the November term thereof, A. D. 1889, and gives the said court there to understand and be informed that William Parrow, late of the city of Alpena, in the county of Alpena and State of Michigan, heretofore, to wit, on the 31st day of May, in the year of our Lord one thousand eight hundred and eighty-nine, at the city of Alpena and in said Alpena county, $35, of the property, goods, chattels, and money of John Muellerweiss and Andrew W. Comstock, members comprising the firm of Muellerweiss & Company, then and there being found, feloniously did steal, take, and carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The court overruled the motion, and the cause proceeded to trial before a jury, who found the respondent guilty.

There are several assignments of error, but they all relate, substantially, to the refusal of the court to quash the information and discharge the respondent by reason of his acquittal under the information for burglary.

It is insisted by counsel for the respondent that the

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trial for the burglary, and for the larceny under the present information, was for the same offense, and therefore the present prosecution is contrary to section 29, Art. 6, of the Constitution of this State, which provides that—

"No person, after acquittal upon the merits, shall be tried for the same offense."

That, inasmuch as larceny might have been charged in the former information, his acquittal thereunder barred a prosecution for larceny forming a part of the same transaction.

The crime of burglary was charged in the first information under How. Stat. § 9134, which provides that—

"Every person who shall break and enter, in the night-time, any office, shop, store, * * * with intent to commit the crime of murder, rape, robbery, or any other felony, or larceny, shall be punished," etc.

The information for burglary, after charging that he did "break and enter," says:

"With intent the goods and chattels of said Mullerweiss & Company, in the said shop then and there being found, then and there feloniously and burglariously to steal, take, and carry away, contrary to the form of the statute," etc.

The last information charges that the respondent—

"At the city of Alpena and in said Alpena county, $35, of the property, goods, chattels, and money of * * * Muellerweiss & Company, then and there being found, feloniously did steal, take, and carry away, contrary to the statute," etc.

In order to convict of burglary under that information, it was necessary to establish that the store was not adjoining to or occupied with a dwelling-house, and a breaking and entering of the store in the night-time, with intent to commit the crime of larceny. The failure to prove these elements would be a failure of conviction.

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The breaking and entering may not have been established, or the fact that it was in the night-time. These elements were not necessary to a conviction of larceny. Mr. Bishop, in his work on Criminal Law (3d ed.), § 803, lays down the rule as follows:

"If a single count of the indictment charges him with breaking, entering, and stealing, they say his offense is single, being burglary committed in a particular manner; but, if the first count sets out in the other way the burglary as done by breaking and entering with intent to steal, then a second count may allege the larceny as a separate thing, and he may be convicted and sentenced for both. Therefore an acquittal of burglary with intent to commit larceny is no bar to a subsequent prosecution for the larceny charged to have been actually committed."

This is the doctrine adhered to in Massachusetts. *Com. v. Goddard*, 13 Mass. 458; *Com. v. Bakeman*, 105 Id. 53; *Morey v. Com.*, 108 Id. 433. It is also followed in Indiana, in *State v. Warner*, 14 Ind. 572. This seems to be the rule which obtains in most of the states.

Counsel for respondent contend that this was the old rule, but that the more modern cases hold that such an acquittal would be a bar. But one case is, however, cited which goes to the extent claimed. *Triplett v. Com.*, 84 Ky. 193, holds such conviction or acquittal a bar. Mr. Justice Pryor, who wrote the opinion of the court in that case, after citing Mr. Bishop and the rule there laid down, says that he is aware the whole weight of authority is adverse to his views, but he thinks that the whole reason and philosophy of the law, as well as justice to the accused, requires a different ruling. The only authority cited, however, by him, is a dissenting opinion in *Wilson v. State*, 24 Conn. 57.

The court very properly held that the acquittal for burglary under that information, as framed, was no bar to this prosecution. In view of this, the other errors

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assigned are unimportant. The case comes up on exceptions before sentence.

The verdict must stand, and the court is advised to proceed to sentence.

The other Justices concurred.

FRANKLIN WRIGHT v. LORINDA WRIGHT.

Divorce—Desertion.

Where, after living peaceably with her husband for 35 years, a wife left her home and went to California to see a married daughter, from whom she had been separated for some years, after which no correspondence passed between the husband and wife, and he, while professing a desire to keep his family together, made no effort to induce his wife to return, his bill for divorce on the ground of desertion is properly dismissed.

Appeal from Lenawee. (Lane, J.) Argued May 2, 1890. Decided May 9, 1890.

Bill for divorce on the ground of desertion. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

J. W. Helme, Jr., for complainant.

LONG, J. Complainant filed his bill for divorce in the Lenawee circuit court, in chancery. On the hearing in the court below, the court dismissed his bill, and he appeals.

It is claimed by the bill that the parties were married in the year 1850, in Jackson, this State, and lived and cohabited together as husband and wife from that time

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until August 15, 1886. There was a son and daughter, issue of the marriage, both of whom are of age. The bill states as the ground for divorce as follows:

"And your orator further shows unto the court that the said Lorinda Wright, disregarding the solemnity of her marriage vow, cruelly and wantonly deserted your orator on or about August 15, 1886, and without any just cause or provocation; that said defendant left this complainant without ever informing him that she was going away, and she has never been back; that he has never heard from defendant, but he is informed by persons that have seen her there that she is now residing in the state of California, and he verily believes that she is still in said state."

An affidavit of non-residence was made, and the usual order of publication entered and published. An affidavit of regularity was filed, and an order entered taking the bill as confessed. The proceedings all appear to be regular. Deposition of witnesses was taken before a commissioner, and reported to the court, from which it appears that for more than 25 years the parties lived together in perfect harmony, treating each other in the most kindly manner, even up to the time of the departure of the defendant for California, in August, 1886. No witness gives, or pretends to give, any reason for her going; and all that is stated by them is that—

"She deserted the complainant and went to California, and has never come back."

On the hearing the complainant was examined in his own behalf in open court. He was asked by his counsel to state the circumstances of the defendant's going away, and replied:

"Well, I do not know anything about her going away. She never said anything to me about it at all. The neighbors told me my wife was going to California. I told them she had said nothing about it. They said she was going. One heard she was going to see her daughter.

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I do not know whether she was or not. She never said anything to me about it, or how long she was going to stay. I told them I did not know anything about it at all. She went off when I was up on the other road, cutting brush. When I got back, she was gone."

It appears from the further examination of the complainant that his daughter, who was married, had been residing in California about eight years; that the son had remained at home until he was of age, when he and his mother, the defendant, went to California,—she going in August, 1886, and the son about two months after his mother. When complainant learned from the neighbors that they were going, he said nothing to his wife of what he had heard. The son took his mother to the depot, and assisted her to go; and from that time the parties have had no correspondence, and only heard from each other through the children. The complainant himself testifies that they never had one word of trouble, but that she told the neighbors that she was going, and that, if she could have her choice to go to California or to go to Heaven, she would go to California; that "she went off the way she did, and I thought I would not trouble myself about it." On an examination by the court, the following appeared:

"*By the Court.* I do not understand your testimony at all when you say you are interested in your family, and want to keep them together. Yet you seem to have done nothing.

"*A.* How could I keep them together, if they wanted to go? I do not think they are bound to stay with me, if they want to go. My son is a married man. He is free to go where he is a mind to. His time is out.

"*The Court.* It seems to me a little unnatural that everything should be pleasant and nice, and your wife pack up and go off, and you never take any steps to find out why it was she desired to leave you.

"*A.* I can bring lots of witnesses that have worked for me for years, and they never saw any trouble. In fact, there never was any trouble.

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"*The Court.* Do you think your wife would come back if you wrote her a nice letter, and told her how much you liked her?

"*A.* I do not hardly think she would.

"*The Court.* Supposing you should go there. Do you suppose she would come back with you?

"*A.* I presume, if I should go for her, she would come back; but it would be a good while before I would go."

How. Stat. § 6228, provides that a divorce from the bonds of matrimony may be decreed when either party shall desert the other for a term of two years. It was said by this Court in *Porritt v. Porritt*, 18 Mich. 420, that the separation required to constitute the offense must be, and continue to be, for the period named, a voluntary breaking off of matrimonial cohabitation by one party against the will of the other, and under circumstances which the law does not consider sufficient to justify it.

It is apparent from this record that the defendant was anxious to see her only daughter, who had been in California for several years, and arranged to go. Her mother heart yearned for the daughter. Her husband was made of sterner stuff, and did not look upon it favorably. He said nothing, though he knew she was going. He did not bid her good-bye, and has never written her since. There never had been any trouble, though they had lived together more than 35 years, and he claims now to have great regard for her and his family. His will is, however, unbending. He will not write, and will not go to her. He has never attempted any reconciliation, and never invited her to return. The least effort on his part, or a little unbending towards her, evidently, would bring her to his home. This he does not choose to do. We are satisfied that the court below properly refused a decree of divorce. The circumstances of the defendant's

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going away, as detailed by the complainant himself, and the conduct of the complainant on that occasion, and subsequently, we think, do not bring the case within the provisions of the statute.

The decree dismissing complainant's bill will be affirmed

The other Justices concurred.

THE PEOPLE v. SYLVESTER CEASE.

Criminal law—Information for incest—Evidence.

1. An information for incest, which charges the respondent, a married man, with having had sexual intercourse with his daughter, need not allege that he committed the crime of adultery; nor is it defective because he is charged with having committed the crime of fornication in so doing.
2. Evidence of prior acts of sexual intercourse between a father and his daughter is admissible on his trial for the crime of incest committed at a later date.

Error to Alpena. (Kelley, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of incest, and sentenced to State prison for 15 years. Affirmed. The facts are stated in the opinion.

Sleator & Greening, for respondent.

B. W. Huston, Attorney General, and *James McNamara*, Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted of incest, and sentenced to the State prison for 15 years.

The information charged him with having committed

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the crime of fornication with one Elizabeth Ann Cease, she, the said Elizabeth Ann Cease, being then and there the daughter of the said Sylvester Cease. It appeared upon the trial that the respondent was a married man at the time of the commission of the offense. The statute reads as follows:

"All persons being within the degree of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall be punished by imprisonment in the State prison not more than fifteen years, or in the county jail not more than one year." How. Stat. § 9291.

It is now contended in his behalf that the information is fatally defective because it did not allege that he committed adultery, instead of fornication. The gist of the offense was the act of sexual intercourse with his own daughter. He could not have been prejudiced by the averment that the act which constituted the crime was fornication instead of adultery. We are not inclined to set aside convictions on such a naked technicality. The case to which we are cited by respondent's counsel, *Territory v. Whitcomb,* 1 Mont. 359 (2 Amer. Crim. R. 159), has no application whatever to the case at bar. The offense charged in that case was fornication; and it would, of course, be necessary to allege and prove that both parties were unmarried. It was unnecessary to allege that the respondent committed adultery or fornication, inasmuch as the information distinctly charged him with the act which constituted the crime of incest. The case falls within the rule laid down in *Hicks v. People,* 10 Mich. 395.

It is also contended that the court erred in admitting evidence of prior acts of sexual intercourse between the respondent and his daughter. This evidence comes

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directly within the rule established in *People v. Jenness*, 5 Mich. 305, where the subject is discussed with great ability by Mr. Justice CHRISTIANCY, and the conclusion reached approved by Justices MANNING, MARTIN, and CAMPBELL.

Judgment is affirmed.

The other Justices concurred.

THE PEOPLE v. ELI DECARIE.

Liquor traffic—Information for engaging in business without paying tax.

In a prosecution for engaging in the sale of liquors without having paid the tax required by Act No. 313, Laws of 1887, the information must show that the defendant is not a "druggist who sells liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with law," thus negativing the exception found in the third section of the act. *People v. Haas*, 79 Mich. 449.

So *held*, where the information, in lieu of thus negativing the exception, read as follows: "The said Eli Decarie not being then and there a druggist, nor a person whose business it was at that time to deal in drugs and medicines."

Exceptions before judgment from Alpena. (Kelley, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of engaging in the business of selling liquors without having paid the tax required by Act No. 313, Laws of 1887. Conviction reversed, and respondent discharged. The facts are stated in the opinion.

Sleator v. Greening, for respondent.

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B. W. Huston, Attorney General, and *James McNamara*, Prosecuting Attorney, for the people.

CAHILL, J. The respondent was charged with and convicted of having violated the provisions of section 7, Act No. 313, Laws of 1887, relating to the taxation and regulation of the liquor traffic.

When the defendant was arraigned in the circuit court his counsel moved to quash the information,—.

"Because said information does not contain the statement, 'the said Eli Decarie *not being then and there a druggist who sells liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only.*'"

The motion was overruled, trial was had, and the respondent convicted. The information upon which respondent was tried in the circuit court was in the usual form, except that it did not contain the words for the omission of which his counsel moved to quash the information. In lieu of such statement the information contained the following:

"The said Eli Decarie not being then and there a druggist, nor a person whose business it was at that time to deal in drugs and medicines."

In overruling the motion to quash the information the circuit judge erred. This case is governed by the case of *People v. Haas*, 79 Mich. 449, where we held that an information substantially like the one in this case was bad.

The conviction was erroneous, and the respondent must be discharged.

The other Justices concurred.

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THE PEOPLE v. JOSEPH M. HILLHOUSE.

Criminal law—Disqualification of prosecutor—Trial—Evidence—Larceny—Claim of right—Replevin.

1. A prosecuting attorney, who is the attorney for the plaintiff in a pending replevin suit, is disqualified, under Act No. 32, Laws of 1889 (amendatory of How. Stat. § 557), from prosecuting the defendant in replevin for larceny alleged to have been committed in recapturing the property replevied, the title of the plaintiff in replevin, and the state of facts under which he claims to maintain his title to the property, being the same as those upon which the charge of larceny is predicated.
2. Where a respondent, charged with the larceny of property on which he held a chattel mortgage, claims to have taken it on the mortgage, it is error to permit the prosecution to prove by an attorney what advice he gave the respondent as to his *right* to so take the property.
3. It is error to permit the people to prove the principal case under the head of rebutting evidence.
4. Where a respondent on his cross-examination is questioned concerning irrelevant matter, the people are bound by his answers.
5. The recapture by a mortgagee of the mortgaged property, which an adverse claimant had replevied from him, is not *of itself* larceny; and if the jury find, by a fair preponderance of evidence, that the mortgagee found the horse running at large in the highway, and supposed that the plaintiff in the replevin suit had allowed him to so run at large, and so given up possession of the animal, they cannot convict.
6. In *all* cases where one in *good faith* takes another's property under a claim of right so to do, or of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim in fact be, and the question of the *bona fides* of the respondent is for the jury.

Exceptions before judgment from Jackson. (Peck, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of larceny. Conviction reversed. The facts are stated in the opinion.

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Blair, Wilson & Blair, for respondent.

B. W. Huston, Attorney General, and *James A. Parkinson,* Prosecuting Attorney, for the people.

CHAMPLIN, C. J. The defendant was convicted of the larceny of a horse. The horse was owned by Edwin F. Hillhouse, a son of defendant, who brought the horse from Ohio for the purpose of putting him into the races. Soon after reaching Michigan, the horse got badly out of condition, and his owner was obliged to put up the entry fees, and, being impecunious, borrowed money from Mr. John W. Boardman, and gave him a mortgage upon the horse. Defendant is a veterinary surgeon, who was then residing in Ohio, and at his son's solicitation he came to Jackson, and treated the horse, with a view of curing him of his ailments, and enabling him to enter the races. This was in August, 1887. In June, 1888, and while defendant was still doctoring the horse, Boardman seized the horse under his mortgage, claiming that there was due to him $210. At this time the defendant claimed a lien on the horse for his medical services for an amount of five or six hundred dollars. To pay the amount due to Boardman, Nathan H. Staples, the complaining witness, and one Hunn advanced the money,—Staples furnishing $100, and Hunn $110. Staples took the horse into his possession, and defendant continued to treat the horse until some time in October following.

In the month of September, 1888, Edwin F. Hillhouse executed to his father, the defendant, a chattel mortgage upon the horse to secure him for his medical services and money paid to and for his son, which mortgage was filed in the clerk's office. In October, 1888, defendant took the horse out of Staples' possession, and Staples replevied it. The replevin suit was tried, and defendant recovered a verdict, which was set aside by the court, on

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the ground that defendant had treated two of the jurors to refreshments. That cause is still pending, and undetermined.

It was claimed on the part of Staples in the replevin suit, and he bases his right to the possession of the horse in that suit upon such claim, that at the time he advanced the $100 defendant asserted a lien of $500 or $600 upon the horse, for medical services in doctoring him, but agreed to waive such lien in favor of himself and Hunn until the advances were repaid, and that he might have the custody and possession of the horse until such advances were repaid, and that the horse was delivered to him under that arrangement. The defendant and his son deny that such was the agreement, and claim that nothing was said about waiving a lien, or giving to Staples a lien upon or possession of the horse; the son stating that the arrangement was that Staples and Hunn were to advance the money to get the horse out from under the Boardman mortgage, and to go in with him in putting the horse in the races in the fall of 1888, and share in his earnings, and get back their money in that way.

Both father and son testified to the way the horse came into the possession of Staples. They said that in April, 1888, they hired Staples to pasture the horse, and that he was in Staples' pasture until the disagreement, in October of that year, out of which the replevin suit grew. The mortgage to defendant was filed in the latter part of September, 1888, and, just before the expiration of the year, the defendant took possession of the horse, as he claims, under and by virtue of the mortgage. Before doing so, he spoke to the sheriff for assistance in getting a horse under a chattel mortgage, which he claimed. The sheriff asked him if he had a writ of replevin, and he said not. The sheriff told him he did not understand

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what use an officer could be to him without such writ. It appears that he, about that time, took the advice of his attorney, who advised him he could take the horse upon his mortgage if he could do it peaceably, and without committing a trespass. He started, in company with one Bryant, in the evening, and drove to Staples' place in the town of Sandstone, and inquired of a neighbor if he had seen the horse in Staples' pasture, and borrowed a lantern to look for him. It appears that Staples lived a short distance from his farm, in the village of Parma, a part of which is in Sandstone, and had the horse in a stable. He was kept in a box-stall, without halter, and in the morning he found the door of the stall partly open, and the horse gone. The defendant claims he found the horse grazing by the side of the road, and took him by virtue of his chattel mortgage. He said he delivered him to Bryant, and claimed not to know where the horse was at the time of the trial. The jury found the defendant guilty of larceny.

This conviction cannot stand. It appears from the record before us, which contains all of the evidence, that the attorney who prosecuted the replevin suit for Staples against the defendant is the prosecuting attorney who procured his conviction of larceny, and, although in his brief filed on behalf of the people he claims that he acted very fair towards defendant, yet we cannot consider this claim, when applying the inhibition of the statute to the transaction. The statute is positive and peremptory that the prosecuting attorney shall not be permitted to prosecute, or aid in prosecuting, any person for an alleged criminal offense, where he is engaged or interested in any civil suit or proceeding depending upon the same state of facts, against such person, directly or indirectly. How. Stat. § 557. The title of Staples in the replevin suit, and the state of facts under which he claimed to main-

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tain his property in the horse, were the same as the facts upon which the charge of larceny is predicated, and the prosecuting attorney was disqualified from acting as prosecutor. After the complaining witness was sworn, and gave his testimony, from which it appeared that the prosecuting attorney was his attorney in the replevin suit, and still was his attorney in that suit, objection was made by the counsel for defendant to the attorney prosecuting any further in the case, on the ground that he was disqualified under the statute above cited. The court overruled the objection, and the prosecuting attorney proceeded to the end of the case to conduct the prosecution. No conviction can be allowed to stand under such plain disregard of the statute.

This error is sufficient of itself to reverse the case, but others no less serious were committed. The court permitted the attorney who gave advice to the defendant respecting his right to take property under a chattel mortgage to testify to what counsel he gave him, and this against the objection of defendant's counsel. This was error.

It was also error to permit the prosecuting attorney to read in evidence a notice which he drew up and introduced upon the preliminary examination before the magistrate calling upon the defendant and Bryant to give notice then and there of the amount of the claim either of them had upon the horse, and where he then was, and that he be brought immediately to sale upon such claim after due public notice, and that said Staples be informed of the time and place of said sale. After reading this notice in evidence before the jury, the prosecutor recalled Staples, and against objection he was asked:

"*Q.* Have you ever received any notice or information of any sale of that horse on any chattel mortgage?

"*A.* I have not."

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Under no view that can be taken was this testimony relevant.

Another harmful error was committed in permitting the prosecuting attorney to prove his principal case under the head of "rebutting evidence." This error was carried so far that twice after the prosecuting attorney had commenced his argument to the jury, after the close of the proofs, he was permitted to suspend his argument, and introduce further and material testimony in support of his principal case. *People v. Quick*, 58 Mich. 321. The course pursued by the prosecuting attorney impresses us as one which was far from affording the accused a fair and impartial trial. The zeal of the prosecuting attorney for his client evidently led him into some indiscretion.

The defendant presented himself as a witness in his own behalf, and upon cross-examination, among other improper questions which the court permitted the prosecutor to ask the defendant, he interrogated the witness thus:

"*Q.* Have you touched the horse's feet from the time it was replevied until you went up and stole it?"

The witness answered:

"Yes; I did not steal the horse."

His counsel then objected, and the court said: "That is an improper remark." The prosecutor, on cross-examination, called out from the witness that he did not tell Hunn that before Boardman should have the horse he would kill him, and afterwards was permitted to call Hunn to prove that he did tell him so. This was error. The inquiry and testimony were concerning irrelevant matter, and could not be contradicted by first calling it out, and then contradicting the witness by proof of such irrelevant matter. *Hamilton v. People*, 46 Mich. 186; *Driscoll v. People*, 47 Id. 413.

The court instructed the jury as follows:

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"If you find from the evidence, beyond a reasonable doubt, that the horse, at the time Dr. Hillhouse took him, was not in Staples' possession, but was running at large in the road, and that Dr. Hillhouse supposed at the time that Staples had allowed him to run at large, and so give up his possession of him, a taking, under those circumstances, would not be sufficient to be the basis of larceny."

This was error. It was not necessary that the jury should find beyond a reasonable doubt that defendant found the horse running at large, or beyond a reasonable doubt that defendant supposed that Staples had allowed him to run at large, and so given up possession of him. If they found such facts to exist by a preponderance of proof, they could not convict.

The fact that Staples had obtained possession of the horse by a writ of replevin did not of itself make it larceny for the defendant in the writ to take the horse from his possession without his consent or knowledge. There is a wide difference between a trespass, though willful, and larceny. The felonious intent is an essential and inseparable ingredient in every larceny, and if a person takes property under a claim of right, however unfounded, he has not committed larceny. Here the defendant had had a chattel mortgage upon the horse for nearly a year, and from all that appears it was to secure him to some extent for a valid indebtedness, and which he believed he had a right to enforce if he could obtain peaceable possession of the property covered by it; and although his right was in dispute, and then the subject of controversy in a pending suit, it is difficult to see how, under the testimony disclosed in this record, he could be guilty of larceny. The felonious intent must be manifested by acts, and consists in appropriating the personal property of another to his own use, or its destruction, without the owner's consent, and without the

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right or claim of right so to do, exercised or made in good faith.

In all cases where one in good faith takes another's property under a claim of right so to do, or of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim may in fact be. 2 Bish. Crim. Law (7th ed.) § 851, and cases cited in note 5; *Rex v. Hall*, 3 Car. & P. 409; 3 Chit. Crim. Law. 926; *People v. Eastman*, 77 Cal. 171 (19 Pac. Rep. 266). It is a matter of evidence for the jury whether it was *bona fide* so taken, or whether it was taken from the person actually in possession of it with felonious intent. 2 Russ. Crimes, 105.

The learned circuit judge very clearly instructed the jury in accordance with the principles above stated, but fell somewhat short of advising them of what bearing the replevin suit should have upon their considerations, and limited the effect of the replevin suit to the right of Staples to the possession of the property until the final determination of that suit. He should have instructed the jury upon this branch of the case that, if they should find that it was the intent of the defendant, in taking the property from Staples' possession,—if they found he did so take it, without Staples' consent, and without any right or *bona fide* claim of right under his chattel mortgage or otherwise,—to deprive Staples of the power to return the property, if return should be awarded in the replevin suit, then they would be justified in finding him guilty of larceny. *Com. v. Greene*, 111 Mass. 392.

For the errors pointed out the conviction must be set aside, and a new trial granted.

The other Justices concurred.

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THE PEOPLE v. PAUL ACKERMAN.

Liquor traffic—Legal holidays—Liability for keeping saloon open.

1. The term "all legal holidays," as used in section 17 of the liquor law of 1887, includes *all* days set apart by the Governor or President of the United States as days for fasting and prayer, or of thanksgiving.
2. The courts will take judicial notice of proclamations by the Governor or President of the United States, setting apart days for fasting and prayer or thanksgiving, and, as the same are published in the daily and weekly newspapers, it is not to be presumed that any citizen is ignorant of them; nor will liquor dealers, or other business men, be permitted to plead such ignorance as an excuse for a non-compliance with, or violation of, the statutes relating to legal holidays.
3. All persons engaged in the sale of liquor in an open saloon on a legal holiday are made principals by section 24 of the liquor law of 1887, and all may be punished for the violation of the statute if proceeded against and convicted.
4. Where all of the facts essential to a conviction are admitted, there is nothing for a jury to pass upon, and it is not error for the court to direct a verdict of guilty. *People v. Richmond*, 59 Mich. 573.

Exceptions before judgment from superior court of Grand Rapids. (Burlingame, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of having kept open, as the agent of Henry Huber, the saloon of his principal on a legal holiday. Conviction affirmed. The facts are stated in the opinion.

L. E. Carroll, for respondent.

B. W. Huston, Attorney General, and *W. J. Stuart*, Prosecuting Attorney (*Stuart, Knappen & Weaver*, of counsel), for the people.

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MORSE, J., The defendant was convicted in the superior court of Grand Rapids upon an information under the liquor law of 1887 of having kept open, as the agent of one Henry Huber, the saloon of said Huber upon a legal holiday, to wit, April 30, 1889.

Two objections only are urged against the legality of this conviction:

1. That April 30, 1889, was not a legal holiday within the intent and meaning of the statute.

2. That, as there was but one business carried on at this saloon, and that by Huber, and as there could be but one violation of the law in keeping the saloon open on that day, and Huber had been convicted of this same offense, the law had been vindicated, and the punishment meted out and justice satisfied; and, as Ackerman was there working for Huber, who was present, and under Huber's direction, he should have been acquitted.

1. The statute defines a legal holiday as follows:

"SEC. 1591. The following days, viz., the first day of January, commonly called 'New Year's Day,' the twenty-second day of February, commonly called 'Washington's Birthday,' the fourth day of July, the twenty-fifth day of December, commonly called 'Christmas Day,' the thirtieth day of May, commonly called 'Decoration Day,' and any day appointed or recommended by the Governor of this State or the President of the United States as a day of fasting and prayer or thanksgiving, shall, for the purposes of presenting for payment or acceptance, and of protesting notice of the dishonor of, bills of exchange, bank checks, and promissory notes, made after this act shall take effect, also for the holding of courts, be treated and considered as the first day of the week, commonly called 'Sunday.'" How. Stat. p. 455.

Upon any and all of these days the liquor law of 1887 provides that the saloons shall be closed, as the holidays defined as "legal holidays" in the act of 1887 are the holidays prescribed by the statute above quoted. See *Reithmiller v. People,* 44 Mich. 280; Act No. 313, Laws of 1887, § 17.

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The 30th of April, 1889, was a legal holiday within the meaning of both statutes. The use of the words "any day," instead of "the day," shows that the intent of the Legislature was not to limit the holidays to the general Thanksgiving day, which is now by proclamation made every year a holiday,—a custom extending back beyond the memory of the present generation,—but to *all* days designated either by the President or the Governor as a day of "fasting and prayer or thanksgiving." The 30th of April, 1889, was known as "Centennial Day," and by proclamation of the Governor of this State, dated April 19, 1889, was specially set apart and recommended as a day of general "thanksgiving and praise to Almighty God." The courts take judicial notice of such proclamations, and as they are published in the newspapers, weekly and daily, it is not to be presumed that any citizen is ignorant of them; nor will liquor dealers, or other business men, be permitted to plead such ignorance in excuse for a non-compliance with, or violation of, the statutes relating to legal holidays.

2. The second objection is also untenable. The statute (Act No. 313, Laws of 1887, § 24) provides that—

"All persons engaged in the business of selling, or keeping for sale, any of the liquors mentioned in this act, whether as owner or as clerk, agent, or servant or employé, shall be equally liable as principals for any violation of any of the provisions of this act, and any person or principal shall be liable for the acts of his clerk, servant, agent, or employé for any violation of the provisions of this act."

The keeping open of this saloon on April 30, 1889, was but one offense for the whole day.

"The saloon is to be closed all day, and the opening of the same once or a dozen times is the same in the eye of the law. If it is not closed all day, the law is infracted, and if it is open all day the law is broken. The statute is violated by its not being closed, and the law

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does not ordinarily divide a day unless the intent of the Legislature is clear." *People v. Cox*, 70 Mich. 250.

The testimony was undisputed that Huber, the proprietor of the saloon, was present and engaged in keeping the saloon open, and that respondent and two other bartenders were there in the capacity of clerks, working for and under the direction of Huber, dispensing drinks; that respondent did not open the saloon in the sense of a manual opening of the door, and all the liquor he sold was while Huber was present. It also appeared that Huber had been tried and convicted of the offense of keeping this saloon open on that day, and that the other two bar-tenders had been arrested for the same offense, but not tried. It is urged that the reasonable construction of the statute is that either the agent or the proprietor may be convicted of and punished for the offense, but that when one of them is so convicted and punished it is a bar to the conviction of the other. We do not think so. All engaged in the selling of liquor in an open saloon on an interdicted day are made principals by the law, and the courts are not concerned with, and will not inquire into, the question of principal or agent, and all may be punished for the violation of the statute if proceeded against and convicted. Nor will it matter who opened the door. Those who are selling behind the bar, or waiting upon customers in any part of the saloon, are equally guilty of keeping it open. There is no injustice in this holding. The respondent was not obliged to be in the saloon on that day, and must be considered to have known the law, and that his acts were unlawful.

As the law also punishes the proprietor for the acts of his clerk or agent, it is suggested that under this interpretation of the statute Huber might be convicted and punished for the act of each of his three bar-tenders on this day and his own act, and thereby be punished four

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times for the same offense upon one day. This is not so. Huber can only be convicted and punished once for keeping his saloon open on April 30, 1889, or any other legal holiday. One conviction would be a bar to any other for the same offense upon the same day. But this does not preclude the arrest and conviction of each of his three clerks for the same offense,—for a transaction in which they aided, and are made principals by the statute. Any number of persons concerned therein may be convicted of the same offense, if their acts in law make them principals, and the conviction of one is no bar to the conviction of the others.

3. A further point is raised that the judge erred in directing a verdict of guilty; that the verdict thus rendered was not the verdict of the jury, but of the court. This point has been settled against the respondent. "As the defendant himself had sworn to his own guilt," and the facts were admitted, there was nothing for the jury to pass upon. *People v. Richmond*, 59 Mich. 573. See, also, *People v. Lyng*, 74 Id. 579.

The conviction is affirmed.

The other Justices concurred.

The People v. Andrew J. Kridler.

Liquor traffic—Keeping saloon open on Sunday—Evidence.

The admission of a respondent on trial for failing to keep his saloon closed on Sunday, that he was the keeper of a liquor saloon located in a front room on the first floor of a designated building, is not *prima facie* evidence that he was the keeper of a like saloon located in a rear room in the second

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story of the same building, and only connected with the other saloon by an outside stairway from an alley at the side of the building.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of keeping his saloon open on Sunday. Conviction reversed. The facts are stated in the opinion.

Eggleston & McBride, for respondent.

B. W. Huston, Attorney General, and *W. J. Stuart,* Prosecuting Attorney *(Stuart, Knappen & Weaver,* of counsel), for the people.

LONG, J. Respondent was arrested, tried, and convicted in the superior court of Grand Rapids upon the charge of having kept his saloon at No. 66 North Waterloo street, in said city, open on October 6, 1889, which was Sunday

On the trial before a jury it was admitted that defendant was the keeper of a saloon at No. 66 North Waterloo street, in said city, in a room on the first floor of the building at that number, and was not a druggist who sold liquor for medicinal, mechanical, chemical, scientific, and sacramental purposes only, and that he paid the State tax, and had a government and city license, for engaging in such business at North Waterloo street, and engaged therein from May 1, 1889, to the time of the offense charged.

The prosecution called two witnesses. Mr. T. W. McKay testified as follows:

"I reside at No. 157 First street. Am an interior decorator. Have known defendant a short time. Know the saloon at 66 North Waterloo street, in this city, and

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have been there. There is another saloon next door, south of this, at the corner of Waterloo and Louis streets. The two buildings are connected in front. I have seen defendant in the saloon at No. 66 North Waterloo street.

"On the evening of October 6 last my brother and I were going to the opera-house, and, as it was early, we took a walk on the streets, and at ten minutes to 8 we turned into the alley in rear of these two saloons, and went to the rear of number 66, and went up an outside back stairs, into a room over the rear part of that number. It was not over the saloon, but over rooms in the rear of the saloon. It was on Sunday. In that room we found a sort of a bar made out of matched stuff. There were some tables in the room, and saw six or seven persons seated about these tables. The defendant was sitting at one table. A man named Walter Hart was tending bar, and we called for two whiskies, and Hart gave us something that tasted like whisky. We paid ten cents a drink for it. We staid long enough to get the drinks, and then went out. I think the bar-tender was Walter Hart. I called him Kennedy, but I think his name was Hart. Heard some one call him Kennedy. Had an introduction to him a month before that. I have seen him tend bar in the saloon below several times. Saw him tend bar there on October 7, and before that time. I can't say who keeps the place we went into Sunday. Don't know whether it belongs to Hart or not, or whether defendant has any interest in it."

Mr. Charles McKay testified:

"I live in the city, and have known the defendant for a short time. I have seen him at the saloon at 66 North Waterloo street, but I can't say that his sign is posted up in front of the saloon, or that his name is there. I knew the bar-tender that was up-stairs about two years. His name is Walter Hart. I saw him tending bar at the saloon down-stairs before that, but can't say how long. I presume since the middle of last summer. Have seen him tending bar there several times.

"I remember going with my brother, the last witness, on October 6 last, between 7:30 and 8 P. M., into a room on the second floor of the building at 66 North Waterloo street. It was on Sunday. We went into the alley in the rear of the saloon, and up the back stairs, which was an

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outside stairs, and into a back room, which is over rooms in the rear of the saloon. We got a drink in there from Hart. Saw defendant and five or six others in that room sitting at tables, but had no conversation with him. We got whisky from Hart, and paid him 20 cents for it. I don't know where he got the whisky from."

On cross-examination, the witness said:

"I don't know who either men were sitting at the tables. I don't know who the business up-stairs belongs to. I can't say that the defendant has any interest in it. Hart didn't go down stairs to get the liquor. I saw no place to go down stairs into the saloon; no entrance to that room up-stairs, except from the outside stairway."

This is all the evidence offered on the part of the prosecution. The defense offered no proofs.

There are several errors assigned, all relating to the charge of the court. It is contended that the admission of the defendant that he is the keeper of a saloon at No. 66 North Waterloo street, in a room on the first floor of the building at that number, assumes that his business is confined in a room on the first floor of that number; and in order to convict him of keeping a saloon or bar open in a room in the same building, but up-stairs, and in no wise connected with his saloon, it is just as necessary to prove that he kept it, or had some interest therein, as it would be to show that he was the keeper of any saloon, if no admissions were made. It is further contended that the jury could not find from the evidence that defendant had anything to do with the saloon up-stairs. The court charged the jury as follows:

"Now, the whole turning-point seems to be, in this case, whether the people have proven that the room up-stairs that the witnesses McKay swear they were in was the room of the respondent. The license of Mr. Kridler to keep a saloon at number 66 covers the entire number 66, and if, without any other showing, the people show that Kridler kept the saloon open on Sunday, or the bar open on Sunday, and sold liquor in any room at number

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66, and you are convinced of that fact beyond a reasonable doubt, then Kridler is guilty of keeping the saloon open on Sunday; and if he kept any room at number 66 open, whether up-stairs or down, a *prima facie* case is made by the poople; and, in order to overthrow that *prima facie* case, there must be a showing that would stagger your determination or your reasonable doubt, by showing by some evidence that some one else occupied the room at 66 instead of Mr. Kridler, up-stairs, or in that room where this liquor was sold.

"Now, if the people have proven, and it is admitted, that Mr. Kridler is licensed and keeps a saloon at number 66, and the proof is that he keeps a saloon at number 66 now, there is no misunderstanding, I presume, that, in the absence of any other showing, if Mr. Kridler or his bar-tender were selling liquor at number 66, up-stairs or down-stairs, on Sunday, the presumption is that he, Kridler, kept the saloon, in absence of any testimony to the contrary. If you find that the respondent, Kridler, kept the saloon at 66, and that he occupied rooms above the saloon, and in connection with the saloon, and further find that at 66, up-stairs, the respondent, Kridler, kept liquors for sale on Sunday, October 6, either by means of himself, his agent, or bar-tender, and on Sunday, October 6, at such rooms, up-stairs, he kept, and by his bar-tender sold, on Sunday, to the McKay brothers, as testified by them, then, in that case, he would be guilty of the offense charged."

It is contended that the following portion of the charge is erroneous:

"And if he kept any room at number 66 open, whether up-stairs or down, a *prima facie* case is made by the people; and, in order to overthrow that *prima facie* case, there must be a showing that would stagger your determination or your reasonable doubt, by showing by some evidence that some one else occupied the room at 66 instead of Mr. Kridler, up-stairs, or in that room where the liquor was sold;"—

a—Because it assumes that there is some evidence that respondent kept the room up-stairs open.

b—Because the jury were thereby instructed that, even if there was no evidence that respondent had any interest in the room up-stairs, the showing that it is over his

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saloon is *prima facie* evidence that he kept it, unless he makes an affirmative showing that some one else, and not he, occupied and controlled the room up-stairs.

It must be held—

1. That there was some evidence to go to the jury from which they would have been warranted in finding a verdict of guilty.

2. That the court was in error in that portion of the charge above quoted.

The information charged him with having kept open on Sunday, October 6, 1889, a saloon at No. 66 North Waterloo street, in the city of Grand Rapids. The fact that he had a license for keeping and did keep a saloon on the first floor, in a front room of a building numbered 66 on North Waterloo street, is not *prima facie* evidence that he kept a saloon in a rear room in the same building, up-stairs, in no manner connected with the saloon on the first floor front, except by an outside stairway from the alley, at the side of the building. It may also be said that the rule laid down by the court put the burden upon the defendant of showing that these rooms were not connected with his saloon, and not kept by him. The people must make their case, and prove every essential element of the offense, beyond a reasonable doubt.

It is claimed by the people that the facts shown bring the case within the ruling of this Court in *People v. Cox*, 70 Mich. 247, and *People v. Beller*, 73 Id. 640. In *People v. Cox* it appeared that the defendant occupied the whole of the rooms, and, while not keeping the saloon proper open on Sunday, he did sell and furnish beer from the rooms he occupied as living rooms, and it was held that he must be considered as having made these living rooms a part of his saloon. They were, however, connected with the saloon by inward doors. *People v. Beller* was also a very different case. There the sales were from a beer

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garden, connected directly with the bar, and the jury found that the bar was kept open.

The verdict and judgment must be set aside, and a new trial ordered.

The other Justices concurred.

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EDWARD RODE v. RALPH PHELPS, JR., TREASURER, OF WAYNE COUNTY.

Constitutional law—Liquor law of 1889—Legislative journals.

1. Act No. 213, Laws of 1889, known as the "New Liquor Tax Law," as approved by the Governor, and published, was never passed by the Legislature, as shown by an examination of the legislative journals, and is null and void, leaving the liquor law of 1887 in force.
2. The courts will take cognizance of the journals of the Legislature, and look into them, for the purpose of determining whether the methods of the Constitution have been followed in the passage of laws; it being considered that the safety and permanency of our institutions will be best promoted by so doing. *Green v. Graves*, 1 Doug. 351; *People v. Supervisor*, 16 Mich. 254; *Attorney General v. Joy*, 55 Id. 94; *Callaghan v. Chipman*, 59 Id. 617; *Attorney General v. Rice*, 64 Id. 385; *People v. McElroy*, 72 Id. 446; *Sackrider v. Supervisors*, 79 Id. 59.

Mandamus. Submitted April 29, 1890. Denied April 29, and opinion filed May 9, 1890.

Relator applied for *mandamus* to compel the respondent to receive the tax of $300 provided for by the liquor law of 1887, and issue a receipt therefor, on the ground that the law of 1889 was unconstitutional. The facts are stated in the opinion.

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F. A. Baker (*George F. Robison,* of counsel), for relator, contended:

1. The courts take judicial notice of the legislative journals, and have the power to look into the journals for the purpose of determining whether an act has been passed and approved in accordance with the requirements of the Constitution; citing *Green v. Graves*, 1 Doug. 351; *People v. Mahaney*, 13 Mich. 492; *People v. Supervisor*, 16 Id. 254; *Attorney General v. Joy*, 55 Id. 94; *Callaghan v. Chipman*, 59 Id. 617; *Attorney General v. Rice*, 64 Id. 385; *People v. McElroy*, 72 Id. 446; *State v. Deal*, 24 Fla. 293; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Id. 115; *Moog v. Randolph*, 77 Id. 597; *Sayre v. Pollard*, Id. 608; *Smithee v. Campbell*, 41 Ark. 471; *Judicial Opinion*, 35 N. H. 579; *Fordyce v. Godman*, 20 Ohio St. 1; *Gardner v. Collector*, 6 Wall. 499; *Sherman v. Story*, 30 Cal. 253.

B. W. Huston, Attorney General, for the respondent.

MORSE, J. This case involves the constitutionality of Act No. 213, Laws of 1889, known as the "New Liquor Tax Law."

Under the liquor tax law of 1887, the annual tax upon "the business of selling only brewed or malt liquors at wholesale or retail" was $300. Laws of 1887, p. 446. The law of 1889 fixes the tax "upon the business of selling malt, brewed, fermented, or vinous liquors at wholesale, and not at retail," at $500, and "upon the business of selling spirituous, intoxicating, malt, brewed, fermented, or vinous liquors at retail, $500." The act of 1889 differs from the law of 1887 in that it makes no distinction in the amount of the tax between the sale of spirituous and intoxicating liquors, and the sale of malt, brewed, fermented, and vinous liquors. It makes no difference whether they are sold singly, or both at one place. The tax is the same, to wit, $500.

The relator is a resident of the city of Detroit, engaged in the business of selling malt, brewed, and fermented liquors at retail at 107 Gratiot avenue. Intending to continue

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the business for the year 1890, on April 16, 1890, he tendered to Ralph Phelps, Jr., the county treasurer of Wayne county, the sum of $300, with an affidavit that he was then engaged in said business, and that he intended to engage in the same business, at the same place, from May 1, 1890, to April 30, 1891, and requested the said county treasurer to accept said $300, and to issue a receipt to said relator, under the provisions of Act No. 313, Laws of 1887, for the business of selling malt, brewed, or fermented liquors at retail for the year commencing May 1, 1890. The county treasurer refused to accept said money, or to issue said receipt, on the ground that the act of 1889 was in force, and that under said act the retail tax was fixed at $500 upon the business of selling such liquors.

It is claimed by the relator that the act of 1889 as signed by the acting Lieutenant Governor and the Speaker of the House, and as approved by the Governor and deposited with the Secretary of State, was never passed by the Legislature, which fact is established by the journals of the two Houses. Upon an examination of such journals, we find, beyond question, that this act was never adopted by both Houses in the shape that it was certified to the Governor and approved by him.

The history of this failure of legislation, in brief, as shown by the journals, is as follows: The bill was introduced in, and finally passed by, the House, and sent to the Senate. The Senate made nine amendments to the bill as it passed the House. Upon its return to the House, these amendments were reported in detail to the House, and spread upon the Journal. The bill, as it came from the Senate, is set out at length and in full in the House Journal, from page 1792 to page 1804, inclusive.

The House refused, upon June 5, 1889, to concur in any of the Senate amendments. House Journal, p. 1818.

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Afterwards, two separate committees of conference were appointed to adjust the differences between the two Houses. The second conference committee recommended that the House concur in the first, third, sixth, seventh, eighth, and ninth of the Senate amendments; and, by the subsequent proceedings, these may be considered as properly receiving the concurrence of both Houses, and are found in the act approved by the Governor. In relation to the second, fourth, and fifth of the Senate amendments, the conference committee made certain recommendations compromising and adjusting the differences between the two Houses. The report of this second conference committee was agreed to and adopted by the two Houses, and the bill as so amended was passed by each House. But, in engrossing the bill and presenting it to the Governor, the bill, as originally passed by the House and sent to the Senate, with the nine Senate amendments added thereto as it passed the Senate, was copied, and all the amendments and modifications proposed by said second conference committee and adopted by both Houses were omitted. In this shape the bill was signed by the President of the Senate, or acting Lieutenant Governor, and the Speaker of the House, approved by the Governor, and deposited in the office of the Secretary of State.

It follows that this act, as it now stands upon the statute-book, was never passed by the House, but rejected; and, although it once had the approval of the Senate, that body subsequently adopted the amendments and modifications of the conference committee. So that the act, in fact, as it now reads, was adopted by neither House. These things are plainly apparent from a perusal of the journals, and a comparison of the bill as there recorded, as being passed by both Houses, and the act shows the difference between the two. These differences are:

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1. Upon the business of selling spirituous or intoxicating liquors at wholesale, and not at retail, $600 in the bill as passed, when it is $500 in the act as approved.

2. Upon the business of selling spirituous, intoxicating, malt, brewed, fermented, or vinous liquors at wholesale and at retail, $1,100 as passed, and $1,000 in the act as signed by the Governor.

3. Section 3, of the bill, *as passed*, reads as follows:

"SEC. 3. The penal provisions of this act shall not apply to druggists who have a permit to sell any of the liquors enumerated in section one of this act for chemical, scientific, sacramental, medicinal, and mechanical purposes, as provided in this section. The township boards and village and city councils of the respective towns, villages, and cities of this State, upon the written application of any druggist who is, or who employs, a registered pharmacist, may grant to such druggist, if they deem proper, a permit to sell the liquors enumerated in this act for chemical, scientific, sacramental, medicinal, and mechanical purposes, but for no other purposes whatever. The sum to be paid to the township, village, or city for such permit shall be one dollar, which sum shall be due and payable when said permit is granted. Applications for permits shall be made by petition signed and sworn to by the applicant, and filed with the township, village, or city clerk, or recorder, as the case may be, of the township, village, or city in which such druggist proposes to sell intoxicating liquors under the permit applied for, which petition shall state the applicant's name, place of residence, in what business he is then engaged, and in what business he has been engaged for two years next preceding the time of filing petition; that he is, or employs, a registered pharmacist; that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years preceding his application; and that he desires a permit to keep and sell such liquors for chemical, medicinal, sacramental, scientific, and mechanical purposes, and for no other purposes whatever.

"Permits granted under this section shall be for a term ending on the first day of May next ensuing, but such permit may be revoked by the authority granting the same whenever the holder of such permit shall have been adjudged guilty of violating any of the provisions of this act, whether relating to his business as druggist or not. It shall not be lawful for any such druggist, nor for any person whose business consists in whole or in part of the sale of drugs and medicines, directly or indirectly, by himself, his clerk, agent, or employé, at any time, to sell, furnish, give, or deliver any spirituous, intoxicating, malt, brewed, fermented, or vinous liquors, or any mixed liquor, a part of which is spirituous, intoxi-

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cating, malt, brewed, fermented, or vinous, to a minor, except for medicinal or mechanical purposes, on the written order of the parent or guardian of such minor, nor to any adult person whatever who is at the time intoxicated, nor to any person in the habit of getting intoxicated, nor to any person when forbidden in writing so to do by the husband, wife, parent, child, guardian, or employer of such person, or by the supervisor of the township, mayor, director of the poor, or any supervisor or alderman of the city, or president or trustee of any village, or superintendent of the poor of the county, in which such person shall reside or temporarily remain, nor to any other person, to be used as a beverage, nor to any person to be drank on the premises, nor to be mixed and drank with any beverage drawn from a soda fountain or other apparatus or device for dispensing aerated or other beverages; but such druggist shall be allowed to sell said liquors for medicinal, chemical, scientific, mechanical, and sacramental purposes only, without the payment of any tax specified in section one, and subject to the following restrictions and conditions:

"Every such dealer in drugs and medicines shall procure from the treasurer of the county in which he is carrying on said business suitable record books, and shall keep the same, in which shall be recorded in ink, by said druggist, his clerk or employé, all the applications for, and sales and gifts of, any spirituous, intoxicating, malt, brewed, fermented, or vinous, or mixed liquors, for any purpose whatsoever, together with the full name or names of the person or persons, applying for such liquor or liquors, as aforesaid, the date of each application, sale, or gift, the amount and kind of liquor applied for and sold and given away to each and every person, and the purpose for which the same was to be used. The aforesaid application shall be filled out by the druggist, his clerk or employé, and countersigned by the druggist, his clerk or employé, and, in case a written or printed, or partly written and partly printed, order be received for any of the aforesaid liquors, such druggist, his clerk or employé, shall attach the same to said record book, in its regular order of receipt and sale, and shall countersign such order the same in all respects as if it were an application as before described.

"Such record book shall be kept in a conspicuous place in said store, and at all times be subject to public inspection. On the first day of May, annually, or within five days thereafter, the druggist shall deliver said record book of applications and sales or gifts to the clerk of the township, village, or city in which the store of such druggist is located, and shall at the same time securely and firmly attach to said record book an affidavit sworn to before some person authorized to administer oaths, which said affidavit shall be signed and sworn to by himself, and shall state that he has not,

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and to the best of his knowledge and belief his employés have not, during the preceding year, sold, delivered, furnished, or given away any of the liquors in this section heretofore mentioned. And said affidavit shall declare that the applications and orders, sales and gifts, of spirituous, intoxicating, malt, brewed, fermented, or vinous, or mixed liquors recorded within the record book to which the affidavit is attached include all the sales or gifts of any such liquors aforesaid, and the full names of the persons to whom sold, together with the purposes to which the same was to be applied, made at the store of the affiant during the year last past, ending on the thirteenth day of May, 18—, and that the affiants have not sold any liquors as aforesaid to any person or persons to be drank on the premises, nor to be mixed and drank with any beverage drawn from a soda fountain or other apparatus or device for dispensing aerated or other beverages. Said record book shall be placed and remain on file in the office of said township, village, or city clerk, and shall be open to public inspection, and in all courts of law shall be taken as *prima facie* evidence of the applications and sales or gifts therein specified and recorded.

"Any such druggist, clerk, or employé who shall, in any manner or respect, willfully make a false or fraudulent entry or record in any such record book, or neglect to record any sale of liquors made by him, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars, nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than ninety days, or by both such fine and imprisonment, in the discretion of the court; and any such druggist who shall, in any manner or respect, willfully make a false or fraudulent affidavit in relation thereto, shall be deemed guilty of perjury, and subject to the pains and penalties therefor; and any person contemplated by this act who shall fail, neglect, or refuse to make return, as provided above, to the township, village, or city clerk, within five days after the time as specified, shall, upon proper conviction before any court of competent jurisdiction, be fined in any sum not less than one hundred nor more than three hundred dollars, or be imprisoned in the county jail not less than thirty nor more than ninety days, or both such fine and imprisonment, in the discretion of the court.

"Any person or persons who shall procure, or attempt to procure, any liquor as mentioned in this act by fraudulent statements or by misrepresentations, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not less than fifty nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty nor more than ninety days, or both such fine and imprisonment, in the discretion of the court.

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"And it shall be the duty of the Auditor General to prepare record and permit blanks conforming to the provisions of this section, and to furnish the same in proper quantities to the several county treasurers of this State, which said record and permit blanks shall be furnished by the said county treasurers, in proper quantities, to the several dealers in drugs and medicines authorized to do business under the provisions of this section upon application in writing made by said dealer in drugs and medicines.

"And such druggists shall, on or before the first day of May in each year, or before commencing business, execute and file with the county treasurer of the county in which he is carrying on such business a bond, the sufficiency of which shall be determined by the township board of the township or the board of trustees or the council or common council of the village or city in which such business is proposed to be carried on, to the people of the State of Michigan, in the sum of two thousand dollars, with two or more sufficient sureties, who shall be freeholders and residents of the county in which such business is proposed to be carried on, each of whom shall justify in a sum equal to the amount of the bond, over and above all indebtedness, and all exemptions from sale on execution, and all liability on other similar bonds, which bond shall be substantially in the following form:

"Know all men by these presents, that we, ———, as principal, and ——— and ———, as sureties, are held and firmly bound unto the people of the State of Michigan in the sum of two thousand dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"Sealed with our seals, and dated this ——— day of ———, 18—.

"Whereas, the above-named principal proposes to carry on the business of a druggist at ———, in the county of———, and State of Michigan; whereas, the said principal hath covenanted and agreed, and doth hereby covenant and agree, as follows, to wit:

"That he will not, directly, or indirectly, by himself, his clerk, agent, or employé, at any time, sell, furnish, give, or deliver any spirituous, intoxicating, malt, brewed, fermented, or vinous liquor, or any mixed liquor, a part of which is spirituous, intoxicating, malt, brewed, fermented, or vinous, to a minor, except for medicinal or mechanical purposes, on the written order of the parent or guardian of such minor, nor to any adult person whatever who is at the time intoxicated, nor to any person in the habit of getting intoxicated, nor to any person when forbidden in writing so to do by the husband, wife, parent, child, guardian, or employer of such person, or by the supervisor of the township, mayor or director of the poor of the city, or superintendent of the poor of the county, in

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which such person shall reside or temporarily remain, and that he will not sell any such liquor to be drank on the premises, nor to be mixed and drank with any beverage drawn from a soda fountain or other apparatus or device for dispensing aerated or other beverages; that he will sell such liquors for chemical, scientific, medicinal, mechanical, and sacramental purposes only, and that he will pay all damages, actual and exemplary, that may be adjudged to any person or persons for injuries inflicted upon him or them, either in person or property or means of support, by reason of his selling, furnishing, giving, or delivering any such liquors contrary to the provisions of this act.

"Now the condition of this obligation is such that if said principal shall well and truly keep and perform all and singular the foregoing covenants and agreements, and shall pay any judgments for actual or exemplary damages which may be recovered against him in any court of competent jurisdiction, and all fines and costs that may be imposed upon him, for violations of this act, then this obligation shall be void and of no effect; otherwise the same shall be in full force and effect.

_____[L. S.]
_____[L. S.]
_____[L. S.]

"Signed and sealed in the presence of

_____, _____.

"A new bond shall be required by the county treasurer with whom such bond was originally filed in case of the death, insolvency, or removal of either of the sureties; and it shall not be lawful for any person to sell any of the liquors mentioned in this section, after being notified by the county treasurer to procure a new bond, until said bond shall have been executed and approved by proper authority:

"*Provided*, however, that no new bond shall be required by the county treasurer of any person or persons who have filed a bond, and are doing business under the provisions of this section, until it shall be made to appear to said county treasurer, upon summary hearing, that either of the sureties upon such bond have died, removed, or become insolvent; and such hearing shall not be had until after reasonable notice thereof, stating the time and place of such hearing, shall have been given in writing, by said county treasurer, to the principal or principals on such bond.

"Whenever any druggist shall violate any of the provisions of this section, if there is no specific penalty provided therefor by this act, he shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine of not less than one hundred nor more than five hundred dollars, and costs of prosecution, or by imprisonment in the county jail not less than ninety days nor more

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than one year, or both such fine and imprisonment in the discretion of the court: *Provided*, that every drug clerk shall, in addition, be responsible for violating the provisions of this act, for his personal act or negligence or violation, subject to the same penalty as proprietors or employers."

See conference report, House Journal, pp. 2202–2209. Conference report adopted—yeas 55, nays 29. House Journal, pp. 2210, 2211.

See conference report, Senate Journal, pp. 1373–1377. Report adopted—yeas 21, nays 6. Senate Journal, page 1378.

It is also shown that the conference committee reported in favor of striking out the following proviso, which is now found in the act as approved and deposited with the Secretary of State:

"*Provided*, that no person, firm, or corporation paying a wholesale tax on the business of selling distilled or spirituous liquors or intoxicating liquors shall be required to pay a tax for selling at wholesale malt, brewed, fermented, or vinous liquors at the same place of business." See House Journal, p. 2209; Senate Journal, p. 1377; Laws of 1889, p. 302 (first proviso).

Thus it will be seen that this act contains a proviso of importance which, the journals of both Houses show, was stricken from the bill before its passage.

A comparison of section 3 of the bill as passed, and section 3 of the act as signed, shows radical differences as to the regulations and restrictions placed upon druggists. The bill as passed provides that druggists must obtain permits from township boards and village and city councils, and sets out the manner and conditions of obtaining such permits, which permits may be revoked by the authority granting them. It also provides different and more stringent regulations as to the keeping of record books, and declares that such books shall, at the end of each year, together with an affidavit, the form of which is prescribed in the bill, be deposited with the township,

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village, or city clerk, where they shall remain open to public inspection. One paragraph of the section provides for the punishment, by a fine not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty nor more than ninety days, or both such fine and imprisonment, in the discretion of the court, of any person who procures liquor of a druggist by fraudulent statements or by misrepresentations. The bond is also somewhat different. This provision in the law relative to druggists was one of the most stubbornly contested causes of difference between the two Houses, and between the members of both branches of the Legislature; and it is pretty plainly apparent, from an inspection of the journals alone, that the act as it now stands, containing the provisions of section 3, could not have been passed. These radical differences between the act found upon the statute-book, and the bill as it passed, preclude any idea of attempting to save any portion of the act. It was never passed by the Legislature, and is null and void, leaving the act of 1887 in force.

The Attorney General admits that the law must fail if the Court has power to go behind the certificates of the presiding officers of the two Houses, and the approval of the Governor, and inspect the journals, to ascertain whether the law was actually passed by the Legislature as so certified and approved. We have heretofore uniformly held, in this State, that the courts would take cognizance of the journals of the Legislature, and look into them, for the purpose of determining whether the methods of the Constitution have been followed in the passage of laws, considering that the safety and permanency of our institutions would be best promoted by such holding. *Green v. Graves*, 1 Doug. 351; *People v. Supervisor*, 16 Mich. 254; *Attorney General v. Joy*, 55 Id. 94; *Callaghan v. Chipman*, 59 Id. 617; *Attorney General v.*

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Rice, 64 Id. 385; *People v. McElroy,* 72 Id. 446; *Sackrider v. Supervisors,* 79 Id. 59.

This case exemplifies the wisdom of these decisions. If the rule prevailed here which is adopted in some of the states of the Union, that the courts have no power to go behind the authentication of a law by the presiding officers of the Legislature, and the approval of the Governor, to ascertain whether or not it was legally passed, under the requirements of the Constitution, we should always be in danger of having laws upon our statute-books, which, although the courts would be obliged to hold them valid under such a rule, were never passed by the Legislature, and were really created by the carelessness or corruption of some member, clerk, or employé of that body, or perhaps by the interpolation of a member of what is sometimes facetiously called the "Third House," but which is nothing more nor less than an organized, and generally unscrupulous, lobby. The people speak, in the enactment of laws, through the Legislature, acting within the limits of the Constitution; and any holding which would authorize or permit laws, or any part of any law, to be ordained or created in any other way, would be inconsistent with the logic of our free institutions, and dangerous to the safety and security of the liberties of the people. And it is also noticeable, as shown by the brief of the relator, that many of the states which formerly held a different doctrine from that laid down by this Court have since, under constitutions similar to ours, which require that all bills shall be passed by yea and nay votes of record, admitted the right and duty of the courts to go behind the official authentication of the law, and inquire into the manner or methods of its adoption, to ascertain whether or not it was properly and legally passed as required by the con-

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stitution. See *Freeholders v. Stevenson*, 46 N. J. Law, 173; *State v. Mead*, 71 Mo. 266, 270; *People v. Petrea*, 92 N. Y. 128, 139. As to other states holding with this Court, and not cited in *People v. McElroy*, 72 Mich. 446, see *Jones v. Hutchinson*, 43 Ala. 721; *State v. Deal*, 24 Fla. 293; *Judicial Opinion*, 35 N. H. 579, 52 Id. 622. And in the federal courts, see *Gardner v. Collector*, 6 Wall. 499; *County of San Mateo v. Railroad Co.*, 8 Sawy. 238 (13 Fed. Rep. 722).

It is to be deeply regretted that as important a law as this, covering a subject of great public interest, should, because of the gross carelessness, or worse, of some one, be wiped bodily from the statute-book. But the courts are not responsible for this; nor can they usurp the functions of legislation, and, by shutting their eyes to the records of legislative doings, declare a law valid that never passed the Legislature, however well authenticated it may be by the certificates of officials.

It seems almost incredible that such a blunder as this could pass unnoticed by so many persons, whose duty it was to see that the bill as passed should go, without change or alteration, into the statutes, when the evidences of such change and alteration are so plain upon the face of the journals of both Houses. But so it is, and there is no remedy for it. It will be noticed that every change except the proviso, which was stricken out of the bill as passed, but found in the act as heretofore stated, was made in the interest of the liquor dealer, and yet the attack upon the law in this Court comes from the very class who were to be benefited by the changes. This, however, is not material to the issue before us, and can have no weight in our determination.

The whole law, as before said, must be decreed void, but we cannot grant the writ of *mandamus* as prayed, because

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there is no showing that the bond required by law has been approved and filed as required by the law of 1887; and no costs will be allowed.

We have been greatly aided in our investigation of the journals by the clearly stated and exhaustive brief of the relator's counsel, Mr. F. A. Baker; and we are much indebted to him for the industry shown in research, and the accuracy of his statements of the result of such research.

The other Justices concurred.

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THE PEOPLE v. GEORGE GOOSEMAN.

Criminal law—Preliminary examination—Jurisdiction of police court of Grand Rapids.

The police court of the city of Grand Rapids has jurisdiction to examine and hold to bail persons charged with the violation of the liquor law of the State, or with other misdemeanors not triable before a justice of the peace. *Averill v. Perrott*, 74 Mich. 296.

Exceptions before judgment from superior court of Grand Rapids. (Burlingame, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of keeping his saloon open on Sunday. Conviction affirmed, and court advised to proceed to judgment. The facts are stated in the opinion.

Eggleston & McBride, for respondent.

B. W. Huston, Attorney General, and *W. J. Stuart*,

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Prosecuting Attorney (*Stuart, Knappen & Weaver,* of counsel), for the people.

MORSE, J. The respondent was convicted in the superior court of the city of Grand Rapids upon an information charging him with keeping his saloon open in said city, in violation of the law, upon Sunday, October 22, 1889.

The complaint was made in the police court of Grand Rapids, and all proceedings preliminary to the filing of the information were had in that court. After his conviction the respondent made a motion in arrest of judgment, and for his discharge, upon the ground that the police court of Grand Rapids had no jurisdiction to examine and hold to bail persons charged with violations of the criminal laws of this State, not triable by justices of the peace, except in case of felonies. The motion was overruled by the judge of the superior court, and respondent brings exceptions before judgment, the sole complaint being the overruling of such motion.

The identical question was before us at the October term, 1888, upon *mandamus,* in the case of *People, ex rel. William J. Stuart, Prosecuting Attorney of Kent County, against the Judge of the Police Court of Grand Rapids.* Judge Holmes had refused to issue a warrant upon a sworn complaint for violation of the liquor law, or to take cognizance thereof, upon the ground that the case was a misdemeanor under the decision of the Supreme Court, not triable in said police court, and because the superior court had, since said Supreme Court decision, dismissed a like case because such superior court held that the police court had no jurisdiction to entertain preliminary examinations in such cases; and that, therefore, being, as it were, between two fires, interdicted by the Supreme Court from trying such cases, and prevented by the action of the superior court from taking an examination and hold-

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ing the accused for trial in that court, he thought it his duty not to assume any jurisdiction in such cases. At the hearing, and after argument upon both sides, we decided that the police court had jurisdiction to issue warrant, hold examination, and bind over the offender to the superior court for trial, and issued our writ in accordance therewith October 9, 1888. We filed no written opinion.

We have examined the briefs filed in the present case, and find no reason for changing our opinion entertained at the hearing of the *mandamus* proceedings. The police court of Grand Rapids was established and organized in the year 1873. See 3 Acts 1873, p. 189. By this act the court was given,—

"Concurrently with the justices of the peace of said city, the same jurisdiction in criminal cases which by law is conferred upon such justices of the peace in the arrest and examination or trial of offenders against the general laws of this State for offenses committed within the limits of said city." Id. 191.

The court was reorganized in 1879, and the act of 1873 repealed. Laws of 1879, p. 66. Section 5 of the act of 1879 provided, among other things, that the police judge should have all the powers and authority of a justice of the peace except in the trial of civil cases. Section 6 gave the court exclusive original jurisdiction—

"To issue process for, hear, try, and determine all cases of misdemeanor, and of a *quasi* criminal nature, committed within the corporate limits of said city, heretofore within the jurisdiction of justices' courts, * * * and also exclusive original jurisdiction to issue process for, hear, and examine, and hold to bail or discharge all persons charged with the commission of felonies within the corporate limits of said city."

Section 20, p. 72, provides that in cases of examination the prosecuting attorney of Kent county may employ a stenographer, etc. In 1885 certain sections of the act of

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1879 were revised and amended. Section 5, as amended, contains the same clause as in the act of 1879, giving to the police judge all the powers and authority of a justice of the peace except in the trial of civil cases. Laws of 1885, p. 125.

Section 6, p. 126, provides that—

"Said police court shall also have exclusive original jurisdiction to issue process for, hear, try, and determine all cases of misdemeanor, and of a *quasi* criminal nature, committed within the corporate limits of said city heretofore or hereafter within the jurisdiction of justices' courts, and all cases of misdemeanor committed within the corporate limits of the city of Grand Rapids."

Said court was also given the same jurisdiction to examine and hold to bail or discharge persons charged with felonies as in the act of 1879.

In the case of *People v. Mangold,* 71 Mich. 335, we held that the police court had no power to try and determine a misdemeanor not triable before a justice of the peace. It is argued by the respondent's counsel that it was intended by the act of 1885 to give the police court power to try such cases as the one at bar, misdemeanors, and all crimes less than felonies, and to provide for examinations only in the latter class of offenses, and that, it being decided by the Supreme Court that so much of the act as gave authority to the court to try and determine cases of misdemeanor was void, the court was left without any power or jurisdiction to examine and hold to bail for misdemeanors. This is not the correct understanding of the decision in *People v. Mangold, supra.* It was distinctly stated in that opinion that the police court, with the exception of a few pieces of machinery, could not be distinguished from other justices' courts, and that this police court must be put on the same footing with justices' courts in criminal cases. We are all of the opinion that the police court, having, under the clause

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in section 5 heretofore quoted, all the powers and authority of justices' courts except in the trial of civil cases, has jurisdiction concurrently with justices of the peace to issue process for, arrest, examine, and hold to bail persons charged with the violation of the liquor laws, and with other misdemeanors not triable before a justice of the peace. See *Averill v. Perrott*, 74 Mich. 296; *People v. Phalen*, 49 Id. 492, 494.

It follows that the conviction must be affirmed, and the court below is advised to proceed to judgment and sentence upon the verdict.

The other Justices concurred.

THE PEOPLE v. GEORGE H. BROWN, AND THE PEOPLE v. GEORGE GOOSEMAN.

[Two cases.]

Criminal law—Police court of Grand Rapids—Jurisdiction.

These cases are ruled by *People v. Gooseman*, *ante*, 611.

Exceptions before judgment from superior court of Grand Rapids. (Burlingame, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondents were convicted of keeping their saloons open on Sunday. Conviction affirmed, and court advised to proceed to judgment. The facts are stated in *People v. Gooseman*, *ante*, 611.

Eggleston & McBride, for respondents.

B. W. Huston, Attorney General, and *W. J. Stuart*,

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Prosecuting Attorney (*Stuart, Knappen & Weaver,* of counsel), for the people.

PER CURIAM. These two cases are governed by *People v. Gooseman, ante,* 611, and the conviction in each is affirmed, and the superior court of Grand Rapids directed to proceed to judgment upon the verdict.

THE PEOPLE v. GEORGE WELCH.

Criminal law—Trial—Conduct of prosecutor.

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On the trial of a respondent for murder, the prosecuting attorney, at the close of the testimony, stated to the court that the people would only claim a conviction for manslaughter, and the counsel who was assisting him on the trial, after referring to such fact, stated in his argument to the jury that if he believed the respondent not guilty of manslaughter, or if he had a reasonable doubt of his guilt, he would not ask the jury to convict him; to which remarks exception was taken, but no instruction requested concerning the same. And it is held, after reviewing former decisions on this subject, that the expressions used by the counsel were moderate, and explanatory of the action of the prosecutor in not asking for a verdict of murder, and why he should urge a conviction of manslaughter, and that, if respondent's counsel anticipated that the remarks might have a prejudicial effect upon the jury, he ought in fairness to have called the attention of the court to the language used, and requested a charge to remove such effect.

Exceptions before judgment from recorder's court of Detroit. (Chambers, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of manslaughter. Conviction affirmed. The facts are stated in the opinion.

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George F. Robison, for respondent.

B. W. Huston, Attorney General, and *J. V. D. Willcox,* Prosecuting Attorney (*E. F. Conely,* of counsel), for the people.

CHAMPLIN, C. J. Welch was charged with the murder of one Morris Crawford on the evening of July 23, 1889, and was convicted of manslaughter. Two errors are alleged and relied upon here for a reversal.

A brief statement of the facts is that on July 23, 1889, about 9 o'clock in the evening, Morris Crawford and Walter Mason were crossing Macomb street, on Beaubien street, in the city of Detroit, when two men, in a narrow seated side-bar buggy, drawn by a single horse, came along, and stopped on the cross-walk and obstructed the crossing. At first Crawford and Mason attempted to cross in front of the horse, but the men drove ahead, and stopped them. They then tried to cross behind the buggy, but the men pulled the horse back, and prevented them. They finally succeeded in crossing, when Crawford said they ought not to abuse the horse in that way. The men in the buggy then drove to the curb near where Crawford and Mason were, and one of the men said, "We will use you in the same way," and they both alighted, and one attacked Mason and knocked him down, and the other attacked Crawford, knocking him against the fence, and then knocking him down, and beating him. He then went to the buggy, but returned again, saying, "Damn you, I will kill you," and, lifting his head from the ground, kicked him, hitting him in the jaw, and breaking his neck, and killing him. They then resumed their seats in the buggy, and drove away. Welch and one George Considine were arrested for the crime, and were identified by witnesses, among whom was Mason, as the assaulting parties, and Welch was

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identified by him and others as the person who assaulted Crawford. Welch was examined in the police court, and held for trial in the recorder's court. Upon the examination, Mason positively identified Welch as the person who attacked and struck Crawford.

Upon the trial in the recorder's court, the respondent, Welch, testified in his own behalf. On cross-examination, it was elicited that he had been arrested for burglary, larceny, and assault and battery, and on the evening of the alleged murder had been to the office of a morning newspaper, and left a challenge to fight a New York pugilist for $500. He had drank a great many times that day and evening, and had struck a by-stander in the face but a short time before the alleged affray.

After the testimony was all put in, and before going to the jury, the prosecuting attorney stated to the court that the counsel for the people had determined that in their opinion the people had not made out a case of murder, and that all they should claim from the jury was a conviction of the defendant on a charge of manslaughter. The counsel for the people, Mr. E. F. Conely, then addressed the jury, and in the course of his argument, in commenting on the duty of a prosecuting officer, said:

"I stand here representing the people of this State, of whom the defendant is one. I do not believe in partisanship in the trial of a criminal cause, nor in the exhibition of passion or feeling. It should have no place here. If I were capable of scattering among you flowers of eloquence with never so lavish a hand, I should not do it. It may seem extreme, but as I felt that the defendant should not be convicted of any offense greater than manslaughter, and with my associate have so advised the court, and asked an instruction to that effect; so, if I believed the defendant was not guilty of the crime of manslaughter, or if I had a reasonable doubt of his guilt of that offense, I would not stand before you, and ask you to convict him."

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Defendant's counsel excepted to these remarks. In the further course of his argument, Mr. Conely said:

"Now, let us see what kind of a man the defendant is. He has taken the stand in his own behalf, and has admitted that he has been arrested a number of times for assault and battery, and has been convicted of breaking and entering a freight car in the day-time with intent to steal, upon which conviction sentence was suspended; and he tells you that he was a pugilist, and on that day he left a challenge to fight one Ryan. Now, that is the kind of a man that started out that morning; that is the kind of a man you have before you to-day;"—

To which remarks defendant's counsel excepted.

These two exceptions constitute the errors relied upon for reversal. The record shows that the defendant's counsel requested the court, among other things, to charge the jury that they were not to consider the admission of the defendant that he had previously been arrested for other offenses as bearing in any way upon the question of his guilt or innocence of this charge; that they were only to consider that evidence as bearing upon the credibility of the defendant as a witness in his own behalf, which request the court gave in his charge. The record also states that—

"The defendant's counsel did not request the court to charge the jury that they must not be influenced by the opinion or belief of the prosecuting attorney, or counsel for the people, relative to the guilt or innocence of the defendant, nor did they at any time ask any action or instruction on the part of the court in respect of the remarks of counsel."

Counsel for Welch insists that the remarks of counsel first above quoted were unjustifiable, and constitute an error on account of which a new trial must be granted. He cites us to the decisions of this Court in the following cases: *Hurd v. People*, 25 Mich. 416; *Meister v. People*, 31 Id. 99; *People v. Bemis*, 51 Id. 424; *People v. Quick*, 58 Id. 322; *People v. Dane*, 59 Id. 550.

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In *Hurd v. People* the prosecuting attorney claimed the right to call only a part of the witnesses who were conversant with and had knowledge of the *res gestæ*. The remarks of the Court had reference to that state of facts, and not to anything which the prosecutor had said to the jury.

In *Meister v. People* counsel had been retained by private prosecutors, and at their expense, to aid in conducting the prosecution, and it was held that it was improper, and against the policy of our laws.

In *People v. Bemis* it was said that the office of prosecuting attorney was *quasi* judicial, and that he, and any one associated with him, must be exclusively the representative of public justice, and stand indifferent as between the accused party and any private interest.

It is not claimed in this case that Mr. Conley represented any private interest, or that he stood in any other capacity then as the representative of public justice. As such representative, it was his duty, if he believed the defendant guilty under the testimony, to use all fair and honorable means to secure his conviction. The defendant was represented by able counsel, and in such case the prosecuting attorney was not bound to stand aloof or indifferent, and, while he ought not to act in a partisan spirit, he should see to it that law-breakers should not go unwhipped of justice. It is not easy to conceive of a case where the testimony adduced tends strongly to show the guilt of the accused, that, in course of a proper argument, the jury will not become possessed of the opinion or belief that the prosecutor believes the accused guilty of the crime charged.

In *People v. Quick* the prosecuting attorney persisted, against repeated objections, to urge to the jury that a failure to prove discrediting facts on which a witness had been cross-examined was very significant, and if such

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facts existed defendant should have shown them. A specific request for instruction correcting this false assumption was refused, and the prosecuting attorney, in further addressing the jury, said:

"I stand here to-day, under the solemnity of my official oath, and say to you, as a man and a citizen, that I believe they not only lied, but I believe they committed willful and deliberate perjury."

In commenting upon this language, we said that—

"It came from an officer whose sworn duty required him to act only in furtherance of justice, and who is bound by statutory requirements to stand entirely impartial between the complainant and the prisoner. When such an officer gives the jury to understand that what he says is under the sanction of his official oath, and the court, when applied to, declines to correct that statement, it cannot be supposed that jurors may not give credence to it, and govern their decision more or less by it. The impropriety of expressing a personal opinion to the jury upon disputed facts has always been regarded as great, and has in some notable instances led to unpleasant strictures on the character of celebrated counsel. Whatever allowance may be made for professional enthusiasm, a deliberate and solemn averment of counsel's opinion should never be allowed to influence the jury, and when given, as here, as an opinion under oath, it should have been at once shut out, and its influence guarded against by proper instructions, as requested."

It will be seen that, in the manner and substance of what was said by the prosecutor in the suit against Quick, it is materially different from the case under consideration. In the *Quick Case* the asseveration was made for the very purpose of influencing the jury to disbelieve the witnesses for respondent. The court was requested to correct this influence in his charge, and he refused. In the present case the expression was moderate, and explanatory of the prosecutor's action in not asking a verdict of willful murder, and why he should urge a conviction for manslaughter. If the counsel for respondent anticipated that the remark

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might have a prejudicial effect upon the jury, he ought in fairness to have called the court's attention to the language, and requested a charge to remove the effect of such prejudicial influence.

In *People v. Dane* the prosecutor, in his argument to the jury, said—

"That he knew that the defendant was the man who took the money."

We held this to be error, for reasons stated in the opinion. It is not analogous to this case

We have examined the record carefully, and we can see nothing to impeach the conduct of the prosecutor and his counsel in the trial of the cause. Indeed, it was urged upon the argument that the conduct of the counsel had been so fair and so impartial as to impress the jury, as it did the counsel for the respondent, with the extreme candor of counsel, and that, therefore, the language used would be likely to have great weight with the jury as affecting the guilt of respondent. The record returned here shows testimony which, if believed, could leave no reasonable doubt of the guilt of the accused. It does not strike us that the remark could or did have any prejudicial influence with the jury, and no request was made to the court to guard the jury against such influence. We therefore overrule this exception.

The second exception urged is without force, as the court did upon request of counsel give the instructions asked for, and we think the error cured. This exception is likewise overruled, and the court is advised to proceed to judgment.

The other Justices concurred.

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THE PEOPLE v. FRED BECHTEL.

Criminal law—Complaint and examination—Jurisdiction of examining magistrate.

1. The complaint and examination of witnesses required by the statute in cases not cognizable by a justice of the peace need not be reduced to writing.
2. The Court will presume that the justice examined the complainant and his witnesses orally where such fact is recited in the warrant purporting to have been issued upon such complaint and examination.
3. The fact that an affidavit was taken by a justice of the peace in support of a complaint for an offense beyond his jurisdiction to try, prior to reducing such complaint to writing, does not affect his jurisdiction to issue a warrant.
4. The object of the examination of the complainant and his witnesses in a case not triable by a justice of the peace is to enable that officer to determine from it whether there is sufficient ground for issuing a warrant.

Exceptions before judgment from Bay. (Cobb, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of engaging in the business of a retail liquor dealer without having paid the required tax. Conviction affirmed. The facts are stated in the opinion.

D. B. Richardson (*Trask & Smith*, of counsel), for respondent.

B. W. Huston, Attorney General (*Jay P. Lee*, of counsel), and *Curtis E. Pierce*, Prosecuting Attorney, for the people.

LONG, J. The defendant was convicted in the circuit court for Bay county on March 14, 1890, upon an infor-

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mation charging that on December 6, 1889, he was engaged in the business of selling and offering for sale spirituous and intoxicating liquors, and malt, brewed, and fermented liquors, at retail, and that being so engaged he did, on said December 6, unlawfully offer for sale spirituous and intoxicating liquors to one Peter Tierney, he not being a druggist, and not having paid to the county treasurer the tax required by law for selling and offering for sale such liquors.

The defendant, having been arraigned in open court, pleaded not guilty. On motion subsequently made by defendant's attorney, it was ordered that defendant have leave to withdraw his plea for the purpose of making a motion to quash the information and proceedings in the cause. Such motion was based on the following grounds:

"1. The complaint and examination upon oath and in writing of Samuel Catlin, taken and made before Daniel Mangan, police justice of Bay City, in said county, against the respondent, which said complaint and examination was returned by said justice to this court, and is on file herein, does not set up the facts constituting said offense upon the knowledge of said Catlin, but simply upon his suspicions, which said complaint and examination aforesaid were entirely insufficient to give said justice jurisdiction to issue the warrant therein.

"2. The warrant issued by said justice upon said complaint and examination aforesaid is entirely null and void, and insufficient to cause the arrest of said defendant, for the reason that it charges no crime or offense as having been committed, but simply charges that he has reason to suspect, and does suspect, that a crime or an offense has been committed contrary to law.

"3. That the information filed herein by the prosecuting attorney sets up an offense entirely different and distinct from the one charged against said respondent in the complaint and examination made before said justice, and the warrant issued thereupon, and upon which this respondent was arrested and examined before said justice, upon which he was bound over to this court for trial.

"4. That this respondent has had no preliminary

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examination before said justice, or any magistrate authorized by law to make such examination, upon the offense charged herein, and that he has not in any manner waived or forfeited his right to said examination, and that said information is void and of no effect for said reason."

The motion was based upon the complaint and warrant as returned by the justice to the circuit court, and upon the information filed. After this motion to quash was made, on motion of the prosecuting attorney the justice was ordered to make further return, which he did as follows:

"In pursuance of an order made in the above-entitled cause, on this 11th day of March, 1890, I, Daniel Mangan, police justice of Bay City, in said county, do hereby make further return in said cause that, before the complaint upon which the warrant aforesaid in said cause was taken and made before me, Peter Tierney was examined by me under oath, and in writing, which deposition of said Peter Tierney is hereby returned."

The deposition referred to reads as follows:

"STATE OF MICHIGAN, } ss.
"County of Bay, }

"Peter Tierney, being duly sworn, deposes and says that he is a resident of Bay City, Michigan; that he knows Fred Bechtel; that said Fred Bechtel resides in the Lake House, in said city; that there is a saloon in said Lake House; and that on the 6th day of December, 1889, in said saloon, he, the said Fred Bechtel, furnished and gave whisky to the complainant.

"PETER TIERNEY.

"Subscribed and sworn to before me this 10th day of December, 1889. DANIEL MANGAN, Police Justice."

Upon the coming in of this further return, the court overruled the motion to quash, and the defendant entered a plea of not guilty. The case proceeded to trial before a jury, and respondent was found guilty. The only exceptions relied upon here are those above stated; that

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is, that the court erred in not sustaining the motion to quash the information, and discharging the respondent for the reasons set forth in the motion.

The complaint and warrant returned by the police justice, with his certificate of the proceedings had before him, and his finding thereon, are as follows:

"STATE OF MICHIGAN, } ss.
"County of Bay, }

"The complaint and examination on oath in writing of Samuel M. Catlin, taken and made before me, Daniel Mangan, police justice of the city of Bay City, in said county, upon September 11, A. D. 1889, who, being duly sworn, says that heretofore, to wit, on December 6, A. D. 1889, at the city and in the county aforesaid, Fred Bechtel was then and there engaged in the business of selling and offering for sale spirituous and intoxicating liquors, and malt, brewed, and fermented liquors at retail, and, being so engaged in said business, he, the said Fred Bechtel, did then and there, on said December 6, 1889, unlawfully offer for sale spirituous and intoxicating liquors, and did then and there unlawfully give and furnish spirituous and intoxicating liquors, to wit, whisky, to one Peter Tierney, he, the said Fred Bechtel, not having then and there paid to the county treasurer of said county the tax required by law for selling and offering for sale spirituous and intoxicating, and malt, brewed, and fermented liquors, and he, the said Fred Bechtel, not being then and there a druggist, nor any person whose business consists, in whole or in part, of the sale of drugs and medicines, and the liquors so sold and given and furnished as aforesaid not being then and there proprietary patent medicine. All of which complainant has good reason to suspect, and does suspect, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan; wherefore the said Catlin prays that the said Bechtel may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

"SAM'L M. CATLIN.

"Taken, subscribed, and sworn to before me the day and year first above written. DANIEL MANGAN,
"Police Justice."

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"STATE OF MICHIGAN, } ss.
"County of Bay, }

"*To the Chief of Police of said County, greeting:*

"Whereas, Samuel Catlin hath this day made complaint in writing and on oath to me, Daniel Mangan, police justice of the city of Bay City, in said county, that heretofore, to wit, on December 6, A. D. 1889, at the city, in the county aforesaid, Fred Bechtel was then and there engaged in the business of selling, and offering for sale, spirituous and intoxicating liquors, and malt, brewed, and fermented liquors, at retail, and being so engaged in said business, he, the said Fred Bechtel, did then and there, on said December 6, 1889, unlawfully offer for sale spirituous and intoxicating liquors, and did then and there unlawfully give and furnish spirituous and intoxicating liquors, to wit, whisky to one Peter Tierney, he, the said Bechtel, not having then and there paid to the county treasurer of said county the tax required by law for selling and offering for sale spirituous and intoxicating liquors, and he, the said Bechtel, not being then and there a druggist, nor any person whose business consists, in whole, or in part, of the sale of drugs and medicines, and the liquors so sold and given away and furnished as aforesaid not being then and there proprietary patent medicines. All of which complainant has good reason to suspect, and does suspect, contrary to the statute.

"And whereas, on examination, on oath, of the said Catlin, Peter Tierney, by me, the said justice, it appears to me, the said justice, that said offense has been committed, and there is just cause to suspect the said Bechtel to have been guilty thereof:

"Therefore, in the name of the people of the State of Michigan, you, and each of you, are hereby commanded forthwith to arrest the said Bechtel, and bring him before me, to be dealt with according to law.

"Given under my hand and seal at Bay City, in said county, on December 11, A. D. 1889.

"DANIEL MANGAN,
[Seal.] "Police Justice."

Upon this warrant the defendant was arrested and brought before the police justice, and an examination had. The justice made the following return of his findings upon the examination:

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"STATE OF MICHIGAN, } ss.
"County of Bay, }

"*To the Circuit Court for the County of Bay.*

"THE PEOPLE
v.
"FRED BECHTEL.

"I, Daniel Mangan, police justice of Bay City, in said county, do hereby return to said circuit court that on December 11, 1889, Fred Bechtel was brought before me for examination touching the offense charged in the annexed complaint and warrant of arrest by Samuel Catlin, policeman. That such examination was had before me, and it appearing to me that the offense charged in said complaint and warrant had been committed, and that there was probable cause to believe defendant guilty of the commission thereof, he was required by me to enter into recognizance himself in the sum of three hundred dollars, and one surety in the sum of three hundred dollars, for his personal appearance at the next term of the circuit court to answer to any information to be filed against him herein.

"I further return that no such recognizance has been furnished to me.

"I further certify that the testimony taken in such examination, together with the complaint and warrant of arrest, is hereto attached.

"DANIEL MANGAN,
"Police Justice.

"*Dated December* 21, 1889."

On the argument here it is claimed that the further return of the justice ordered by the court below cannot be considered, for the reason that the affidavit which is so returned shows upon its face that it was taken the day before the complaint was made; that How. Stat. § 9455, provides:

"Whenever complaint shall be made to any such magistrate, that a criminal offense, not cognizable by a justice of the peace, has been committed, he shall examine on oath the complainant, and any witness who may be produced by him," etc.

That is, that it appears, at the time this affidavit was

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made, no complaint had been made to the magistrate, and none was made until twenty-four hours thereafter, and that it does not appear that the witness was produced by the complainant, the affidavit describing the affiant as being the complainant. There might be some force in this contention if the statute required the complaint and examination in such cases to be reduced to writing by the justice. But the statute above cited, and the following sections, provide further:

"9456. If it shall appear from such examination, that any criminal offense, not cognizable by a justice of the peace, has been committed, the magistrate shall issue a warrant directed to the sheriff or any constable of the county, reciting the substance of the accusation, and commanding him forthwith to take the person accused of having committed such offense, and to bring him before such magistrate to be dealt with according to law," etc.

"9466. The magistrate before whom any person is brought upon a charge of having committed an offense, and not cognizable by a justice of the peace, shall proceed, as soon as may be, to examine the complainant, and the witnesses in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent."

"9470. If it shall appear to the magistrate, upon the examination of the whole matter, either that no offense has been committed, or that there is not probable cause for charging the prisoner therewith, he shall discharge such prisoner.

"9471. If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken, and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to prison for trial."

The offense with which the respondent was charged was not cognizable by a justice of the peace to try and determine. The proceedings, therefore, from the making

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of the complaint to the time of committing the respondent for trial, were to be governed by the provisions of the statute above quoted. The justice, under these provisions of the statute, shall issue his warrant when complaint is made, if it shall appear to him, from the examination of the complainant, and other witnesses produced, on oath, that a criminal offense not cognizable by a justice of the peace has been committed; the warrant containing the substance of the accusation, and commanding the officer to take the person accused. The object of this examination of the complainant and other witnesses on oath is to enable the justice to determine from it whether there is sufficient ground for issuing the warrant to bring the accused before him for examination. It is not the object of this examination to determine the guilt or innocence of the accused as upon a trial, but whether there is probable cause for believing him guilty. This complaint and examination need not be in writing, but may be taken orally, and, if it appears to the justice that such offense has been committed, he issues his warrant for the apprehension of the party accused. The facts upon which the justice's jurisdiction depends are to be elicited from the witnesses, examined upon oath by the justice in support of the complaint, and the proceedings before issuing the warrant by the justice are entirely informal and *ex parte*. It is his judgment as to whether it appears that an offense has been committed which must be satisfied by such examination. It does not matter that the complaint was not reduced to writing until December 11, and that Tierney's affidavit was taken on the tenth, 24 hours before the time of reducing the complaint to writing. We must presume that the justice examined the complainant and Tierney orally. The warrant recites the fact that—

"On examination on oath of the said Catlin, Peter

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Tierney, by me, the said justice, it appears to me, the said justice, that said offense has been committed, and that there is just cause to suspect the said Bechtel to have been guilty thereof."

The court very properly held that the justice's further return should be considered upon the question of whether any showing was made to the justice which authorized him to issue the warrant. It contained some of the facts upon which the justice acted.

It has been repeatedly held by this Court that, in such cases,—that is, where the offense is not cognizable by a justice,—the complaint and examination need not be in writing. In *People v. Lynch*, 29 Mich. 278, it was said:

"The statute [referring to the statute under consideration] requires the justice to examine the complainant on oath (and any witnesses who may be produced by him), though it does not require that examination to be taken down in writing, nor the evidence to be inserted in the complaint, as in the case of an affidavit for an attachment, or a warrant in civil cases."

In *People v. Clark*, 33 Mich. 119, it was expressly held by this Court that, under this statute no complaint in writing is necessary.

In *Turner v. People*, Id. 370, it was said:

"Another circumstance tends to show the nature and office the Legislature ascribed to the complaint and other proceedings prior to the warrant. The law contemplates that there is no necessity that the magistrate who examines after the arrest, and who must decide whether the accused shall be held or not, should have before him the complaint or any of the proceedings prior to the warrant; because it is expressly provided that, if the magistrate who issues the warrant is absent or unable to attend, the accused shall be taken before some other magistrate of the same county, and that the warrant, with a proper return thereon, signed by the person who made the arrest, shall be delivered to the magistrate. * * * The law here contemplates that the warrant will contain the substance of the accusation, as shown by the examination made before its issue."

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See, also, *Yaner v. People,* 34 Mich. 288. There is no force, therefore, in the proposition that the magistrate had not sufficient evidence before him to authorize the issuing of the warrant.

The other and last objection is that the information charges a separate and distinct offense from that alleged in the complaint and warrant. If there is any material variance between the information and the complaint and warrant, it is justified under the ruling of this Court in *People v. Annis,* 13 Mich. 514. It was there said:

"The statute (Laws of 1859, p. 393) provides that, except in certain specified cases, no information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor before an examining officer or magistrate, unless such person shall waive his right to such examination. The examination under this statute was designed to some extent to accomplish the purpose of a presentment by the grand jury under the law as it existed before, in protecting a party against being subject to the indignity of a public trial for an offense before probable cause had been established against him by evidence under oath. But it was never designed that the complaint or warrant before the magistrate should stand in the place of a formal presentment, nor that in the circuit court the prosecuting officer should be limited by it in the mode of charging the offense. It is undoubtedly competent for him, so long as he does not undertake to proceed against a person for a different transaction than that to which the examination relates, to put his information in such form as in his opinion will enable him to try the offense on the merits * * * to advance the ends of justice."

The case comes up on exceptions before sentence. The verdict must stand, and the court is advised to proceed to judgment on the verdict.

The other Justices concurred.

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THE PEOPLE v. CHESTER BECHTEL.

[See 80 Mich. 623.]

Criminal law—Complaint and examination—Jurisdiction of examining magistrate.

This case is ruled by *People v. Bechtel, ante,* 623.

Exceptions before judgment from Bay. (Cobb, J.) Argued May 1, 1890, Decided May 9, 1890.

Respondent was convicted of engaging in the business of a retail liquor dealer without having paid the required tax. Conviction affirmed. The facts are stated in the opinion, and in *People v. Bechtel, ante,* 623.

D. B. Richardson (*Trask & Smith,* of counsel), for respondent.

B. W. Huston, Attorney General (*Jay P. Lee,* of counsel), and *Curtis E. Pierce,* Prosecuting Attorney, for the people.

MORSE, J. Bechtel was convicted in the circuit court for the county of Bay, of carrying on the business of a retail dealer of spirituous and intoxicating liquors without having paid the tax required by law. When defendant appeared in court, he moved to quash the proceedings for the following reasons:

1. That the complainant had no personal knowledge of the facts set forth in the complaint and examination before the justice before the issuing of the warrant by said justice.
2. That the warrant issued by the justice upon the complaint and examination was entirely insufficient to cause the arrest of said defendant, for the reason that

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no crime or offense is therein charged as having been committed, but it simply avers that complainant "has good reason to suspect, and does suspect," that an offense has been committed.

3. That the information charges a separate and distinct offense from that alleged in the complaint and warrant.

4. That the respondent has had no preliminary examination upon the offense charged in the information.

The motion was overruled, and, upon trial before a jury, the defendant was found guilty. The case comes into this Court upon exceptions before judgment. The only exception relied upon is the overruling of the motion to quash the information and discharge the defendant. The case is governed entirely by *People v. Bechtel, ante,* 623. In accordance with the opinion in that case, the conviction must be affirmed, and the court below directed to proceed to judgment and sentence upon the verdict.

The other Justices concurred.

THE PEOPLE v. HARRY MORRIS AND HARRY MORTON.

Constitutional law—Horse-stealing—Information—Plea of guilty—Sentence.

1. How. Stat. § 9180, providing a distinct punishment for horse-stealing, is constitutional, and does not supersede the general statute against larceny.

2. Where there are two counts in an information charging different grades of the same offense, upon a conviction or plea of guilty, it has been the general practice in England and in this country to pass judgment according to the count charging the highest grade of the offense.

3. It must be presumed, in support of a judgment upon a plea of guilty, that the respondent understood the information read to him, and that the judge, as required by law, correctly explained

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the charge against him before passing sentence, and that he therefore pleaded guilty to *all* that the information contained.

Error to Kalamazoo. (Mills, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondents were convicted of horse-stealing, and were sentenced to State prison for 7 years, and 6 years and nine months, respectively. The facts are stated in the opinion.

D. G. F. Warner, for respondents.

B. W. Huston, Attorney General, and *George P. Hopkins,* Prosecuting Attorney, for the people.

[The points of counsel are stated in the opinion, where the authorities are reviewed and discussed.—REPORTER.]

GRANT, J. The respondents were charged with the larceny of a horse of the value of $150. The information contained two counts,—one framed under the general statute for larceny; and the other charging the larceny under section 9180 of Howell's Statutes, which is an act to provide for the prevention and punishment of horse-stealing. The respondents, upon being arraigned, pleaded guilty. The court made the customary investigation for the purpose of determining whether their plea was made freely, with the full knowledge of the accusation against them, and without undue influence. The court, thereupon, sentenced Morton to the State prison for six years and nine months, and Morris for seven years.

Under the first count, respondents' sentence could not have been more than five years. Under the second count, their sentence could have been not less than three nor more than fifteen years, unless it was their first offense, in which case the court might have sentenced them to the State House of Correction for a term not exceeding

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two years. It is contended that the sentence is erroneous for two reasons, viz.:

1. Because the plea of guilty applied only to the first count, under which the maximum penalty is five years.
2. Because section 9180, How. Stat., is unconstitutional, in that the punishment provided by it is "cruel or unusual."

1. The first contention cannot be maintained. Where there are two counts charging different grades of the same offense, under a conviction or plea of guilty, it has been the general practice in England and in this country to pass judgment according to the count charging the highest grade of the offense. In this case the offense was the same set up in both counts. It must be presumed that the respondents understood the information read to them, and that the judge, as required by law, correctly explained the charge against them before passing sentence. It must therefore be presumed that they pleaded guilty to all that the information contained. We find no authorities to the contrary. *Dean v. State,* 43 Ga. 218; *Adams v. State,* 52 Id. 565; *Estes v. State,* 55 Id. 131; *People v. Shotwell,* 27 Cal. 394; *State v. Tuller,* 34 Conn. 280; *Scott v. State,* 31 Miss. 473; *State v. Core,* 70 Mo. 491; *Com. v. Hope,* 22 Pick. 1; *Lyons v. People,* 68 Ill. 271; *Manly v. State,* 7 Md. 135; *Conkey v. People,* 1 Abb. Dec. 418.

In re Franklin, 77 Mich. 615, is not in point. In that case there were four counts, containing two distinct offenses, viz., larceny and the receiving of stolen goods. If convicted as a receiver, he could under our statute have avoided State prison by satisfaction. A proper regard for the rights of a citizen under such circumstances requires that the record should show of which crime the party is convicted. But the reason of that decision does not apply to cases where the law makes different grades

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of the same offense, nor where by statute the same offense may receive different punishments; nor does the act providing for a distinct punishment for horse-stealing supersede the general statute for larceny. A respondent cannot be prejudiced by a proceeding under the first statute named, nor by counts embodying both statutes. We have statutes providing a different punishment for larceny from the person, from a dwelling-house, at a fire, etc. But it has never been contended that these superseded the general statute for larceny, nor that a person could not be convicted under this general statute, although the facts might warrant a prosecution under the others.

2. Article 6, § 31, of the Constitution of this State, provides that cruel or unusual punishment shall not be inflicted. It is to the credit of our country that its courts have seldom been called upon to determine whether legislative enactments infringe this clause of the Constitution. The question under this statute is for the first time directly before this Court. Indirectly this statute has been brought before the Court on former occasions, but the point has never been decided, though the opinions in those cases contain some expressions hostile to the policy of such legislation. With the policy of the law it is not our province to deal. That belongs to the Legislature, which is composed of representatives direct from the people, and who alone have the right to voice the sentiments of the people in the public enactments. When those sentiments are enacted into law, the only province of the Court is to determine their validity under the Constitution. The rule by which courts must be governed in such cases is as follows:

"When a statute is challenged as in conflict with the fundamental law, a clear and substantial conflict must be found to exist to justify its condemnation."

By this sound rule, and with but little light to be

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gathered from the authorities, so few are they, we must approach the discussion and the determination of this question.

The difficulty in determining what is meant by "cruel and unusual punishments," as used in our Constitution, is apparent. Counsel for defendants claims that, as properly understood, it means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. When, in England, concessions against cruel and unusual punishments were first wrested from the crown, slight offenses were visited with the most extreme punishment, and no protest was made against it. But our concern is to ascertain how this language is to be understood in the constitutional sense. *In re Bayard*, 25 Hun, 548, it is said:

"We first find the injunction against cruel and unusual punishment in the Declaration of Rights, presented by the convention to William and Mary before settling the crown upon them in 1688. That declaration recites the crimes and errors which had made the revolution necessary. These recitals consist of the acts only of the former king and the judges appointed by him, and one of them was that 'illegal and cruel punishment had been inflicted.' * * * The punishments complained of were the pillories, slittings, and mutilations which the corrupt judges of King James had inflicted without warrant of law, and the declaration was aimed at the acts of the executive; for the judges appointed by him, and removable at pleasure, were practically part of the executive. It clearly did not then refer to the degree of punishment, for the criminal law of England was at that time disgraced by the infliction of the very gravest punishment for slight offenses, even petit larceny then being punishable with death. But the declaration was intended to forbid the imposition of punishment of a kind not known to the law, or not warranted by the law."

Justice COOLEY says:

"Probably any punishment declared by statute for an

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offense which was punishable in the same way at the common law could not be regarded as cruel or unusual, in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments, which in any state had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping-post and the pillory in states where they were never recognized as instruments of punishment, or in states whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments. In such states the public sentiment must be regarded as having condemned them as cruel, and any punishment which, if ever employed at all, has become altogether obsolete, must certainly be looked upon as unusual." Const. Lim. (4th ed.) 408.

But for the disposition of this case we may adopt the rule contended for, and then we must find (in order to declare the law unconstitutional) that the minimum punishment provided by the law is so disproportionate to the offense as to shook the moral sense of the people. Imprisonment for larceny is, and always has been, in this country and in all civilized countries, one of the methods of punishment. There may be circumstances surrounding the commission of larceny where fifteen years would not be considered too severe a punishment. When punishment is commensurate with the depravity of the criminal, as shown in the commission of the act, justice is done. Under most of our criminal laws, cases may arise where the punishment inflicted might be considered cruel, but that does not condemn the law. The judge in such case has acted within the jurisdiction of constitutional law, and other means must be resorted to to right the wrong. Appellate courts cannot interfere if the proceedings have been regular. The law itself must therefore be cruel or unusual to warrant the interposition of the courts.

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It is argued that under this law a prisoner must be sentenced from three to fifteen years, while under other statutes, for the larceny of property of the same value, he could only be imprisoned for one year. This is not a fair or legitimate test. Our statutes, and so probably the statutes of all the states, recognize this distinction. Under our statutes larceny from the person, larceny from a dwelling-house, or at a fire, may be punished by imprisonment for five years. The cashier or any officer or servant of a bank, who takes any of the property intrusted to his care, and thereby commits larceny, may be imprisoned for ten years. Any officer, clerk, or person employed in the State treasury may, for larceny therefrom, be imprisoned for fourteen years. So, too, any person who shall, at the same term of court, be convicted of three distinct larcenies, may be imprisoned for fifteen years. In all these cases, the property stolen may not exceed the value of a dollar. It has never been contended that any of the punishments imposed by these statutes were cruel or unusual.

It is also argued that, under this statute, a man must be imprisoned for a longer period than may one who is convicted of manslaughter. The larceny of a horse usually, if not necessarily, implies a bad and wicked disposition. A person may be guilty of manslaughter without possessing any such disposition. He may be convicted of manslaughter when engaged in doing an act which is only *malum prohibitum*, and not *malum in se*. He may be found guilty of manslaughter under circumstances which do not have any tendency to show a wicked intent or purpose. I cannot, therefore, see that this law can be held unconstitutional, because the punishment inflicted must be greater than may be the punishment for manslaughter. This was expressly held in *Ex parte Mitchell*, 70 Cal. 1 (11 Pac. Rep. 488). *In re Bayard*, above cited,

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the law provided a greater punishment for the same crime in the city than in the country, and it was held constitutional.

It will be conceded that the Legislature has the constitutional power to fix the minimum as well as the maximum of the punishment. It has also the exclusive jurisdiction to define "crime," and prescribe the punishment. It is supposed to represent the sentiment and wishes of the people. In these days of intelligence and improvement, extraordinary, indeed, must be the terms of a criminal law which would shock the average judgment of the people. The horse is an animal of peculiar value. His owner becomes attached to him because of his intelligence, and the use made of him. The thief makes him a means of escape by one of many roads. In a few hours he may perhaps drive him into another state. Organized bands of these thieves have existed in various parts of the country, and so extensive have been their depredations that vigilance committees have been organized to accomplish what the authorities seemed powerless to do. Under these circumstances, it seems to me clear that it would be almost a usurpation of authority for the courts to hold that a minimum punishment of three years, even, is so disproportionate to the offense as to be cruel or unusual. But for the first offense the person convicted may be sent to the House of Correction for any period not exceeding two years. Certainly here is discretion enough left to the trial court to protect the rights of any one. The policy of inflicting greater punishments for the second or more offenses has long been adopted, and is not questioned.

A few authorities may be referred to bearing upon the subject. In 1816 the legislature of New York passed an act to suppress dueling, the punishment being that the

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convicted person should be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military. The court held that the punishment did not come within the constitutional prohibition as cruel or unusual. *Barker v. People*, 3 Cow. 686.

A similar statute of the territory of New Mexico, for horse-stealing, imposed the punishment of not less than 30 nor less than 60 lashes on the bare back. Under the provisions organizing the territory, it was provided that the laws passed by the legislative assembly should be submitted to the Congress of the United States, and, if disapproved, should be null and of no effect. The act was submitted to Congress, and had never been disapproved. The law was held constitutional. *Garcia v. Territory*, 1 N. M. 415. See, also, *Ligan v. State*, 3 Heisk. 159.

This law was enacted in 1877, and no demand appears to have been made for its repeal or modification. We may therefore infer that it meets the approval of the people of this State, who, we are confident, would not permit a criminal law shocking to their moral sense, and imposing a cruel punishment, to remain long upon the statute-book. The crime of horse-stealing has generally been regarded from the earliest times as involving a greater degree of criminality than the larceny of other property. In England, by statute (Vol. 3, Eng. Statutes at Large, 1st Edw. 6, chapter 12, § 10, p. 497), in 1547 the horse-thief was deprived of the benefit of clergy, and this distinction was preserved in later statutes. 1 Steph. Crim. Law, 465–468. Statutes similar to our own have been enacted, and are still in force in many of the States. In Texas, this crime is punished by imprisonment for not less than five, nor more than fifteen, years; in Georgia, not less than four, nor more than twenty, years; in Arkansas, not less than five, nor more than fifteen, years; in Tenn-

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essee, not less than three, nor more than ten, years; in Kentucky, not less than two, nor more than ten, years; in Maryland, not less than two, nor more than fourteen, years; in Wisconsin, not less than two, nor more than fifteen, years; in Virginia, not less than three, nor more than eighteen, years; in Illinois, not less than three, nor more than twenty, years; and in many other states the punishment is from one to ten years. We are not pointed to a single decision which condemns such statutes as unconstitutional.

Our conclusion, therefore, is that this statute cannot be condemned by the courts as imposing a cruel or unusual punishment, either in the popular or the constitutional sense. Conviction and sentence affirmed.

The other Justices concurred.

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THE PEOPLE v. SAMUEL A. LESTER.

Liquor traffic—Principal and agent—Place where business is carried on.

An agent of a firm engaged in the sale of liquors cannot carry on such business at a place separate from, and not connected with, the saloon occupied by his principals, under the tax paid by them.

Exceptions before judgment from Berrien. (O'Hara, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of engaging in the business of a liquor dealer without paying the required tax. Conviction affirmed, and the court directed to proceed to judgment. The facts are stated in the opinion.

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O. W. Coolidge and *E. L. Hamilton,* for respondent.

B. W. Huston, Attorney General, and *George W. Bridgman,* Prosecuting Attorney, for the people.

CAHILL, J. The respondent was indicted for having been engaged on June 1, 1888, at Niles, Mich., in the business of selling and offering for sale malt, brewed, and fermented liquors at wholesale and retail, without having paid the tax required by law, and without having the receipt for such tax posted up in the place where said liquors were kept for sale, and without having given the bond as required by law, in violation of Act No. 313, Laws of 1887.

On the trial the defendant admitted that he sold, at the time charged, malt and brewed liquors, in quantities less than 12 quarts, at a place called the "Bottling Works" in the city of Niles, which was situated at the corner of Fifth and Howard streets in that city, and also that he kept and drove a wagon into neighboring towns, from which he sold malt and brewed liquors, in similar quantities, during the month of June, 1888, but claimed that he conducted such business as the agent of Krell & Co., who had paid a tax of $500, and had given bonds in conformity with the statute. It was conceded that Krell & Co. had the right to sell liquors at their place of business on Main street in the city of Niles. The sole question in this case is as to whether the respondent, as the agent for Krell & Co., had the right to carry on business at the bottling works, that being a place separate from, and not connected with, the saloon of Krell & Co. on Main street.

An effort was made by the prosecution on the trial to show that respondent was really carrying on the business in his own interest, and that his claim, that he was acting as agent of Krell & Co., was a mere pretense to avoid

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the payment of the tax. But the circuit judge instructed the jury that this was not important; that, while Krell & Co. had a right to sell beer at wholesale and retail, they could only do so at one place, and that place was their saloon on Main street; that Krell & Co.'s payment of a tax and giving of a bond would not justify respondent in carrying on the business he was engaged in as their agent or otherwise.

In this the circuit judge was right. The statute contemplates that upon paying the tax and giving the required bond a person may lawfully carry on the business of selling liquor at *one place*. Section 4 of the act requires him to specify in his application to the county treasurer to pay the tax the ward, village, or township in which he proposes to carry on the business. Section 6 requires the county treasurer to give the applicant a receipt for the tax, which the party is required to post up in a conspicuous place in the room or place where the business is carried on. Section 8 provides that the principal in the bond shall not be allowed to carry on the business in any other building or place than that specified in the bond without giving notice and executing another bond. But, aside from these express provisions of the statute, it is clear that the position taken by the respondent, if conceded to be correct, would nullify the law. If a person who had so far complied with the law as to be entitled to carry on the business at one place could, by the appointment of agents, justify them in conducting the business at other places, there would be little reason why more than one person should pay a tax and give a bond in each county. The rest of the dealers could act as his agents.

The conviction is affirmed, and the court is directed to proceed to judgment.

The other Justices concurred.

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THE PEOPLE v. JOHN B. CRONIN.

Criminal law—Falsely assuming to be an officer—Statute construed.

How. Stat. § 9252, does not attempt to punish any person for falsely assuming to be a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, but for falsely assuming *to be*, and taking upon himself to *act as*, such officer.

Error to recorder's court of Detroit. (Chambers, J.) Argued May 1, 1890. Decided May 9, 1890.

Respondent was convicted of falsely pretending to be a police officer. Conviction reversed, fine remitted, and respondent discharged. The facts are stated in the opinion.

Charles W. Casgrain and *Edwin Henderson*, for respondent.

B. W. Huston, Attorney General, and *James V. D. Willcox*, Prosecuting Attorney, for the people.

CHAMPLIN, C. J. The information charged that John Cronin, on December 10, A. D. 1889, at the city of Detroit, in the county of Wayne, not being a member of the metropolitan police force of said city, with fraudulent purpose and intent falsely did personate, represent, and pretend to Annie Gregg, and to divers and sundry other persons, that he was then and there a member of the metropolitan police force of the city of Detroit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

The testimony introduced to support this charge consisted of that given by Annie Gregg, the complainant,

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and Joseph Manning, a detective employed in the metropolitan police force of the city of Detroit.

Respondent was a young man, 19 years of age, and, having seen an advertisement in a Detroit paper of detectives wanted in Kansas City, entered into a correspondence with the association, applied for membership, and received a certificate of membership, purporting to be issued by the United States Detective Bureau of Kansas City, as a corporation under the laws of Kansas, dated September 27, 1889, entitling him to the privileges of membership for one year. He also received a badge, in the form of a cross. It was small, long, and narrow, and had the words "Private Detective" upon it, but it was not like the badges worn by the officers of the metropolitan police. He did not represent and pretend in so many words to Annie Gregg to be a member of the metropolitan police force, but told her that he was a detective, and his partner was Joe Manning, and showed her his hand-cuffs and two keys, which he claimed were keys to patrol boxes, and explained to her their use, and what a detective did when he arrested a person; how he took him to the patrol box, and turned him over to the patrolman.

At the close of the people's case the counsel for respondent requested the prosecuting attorney to state whether the information was based upon section 9252 of Howell's Statutes, and he replied that it was. This section reads as follows:

"If any person shall falsely assume or pretend to be a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, and shall take upon himself to act as such, or to require any person to aid and assist him in any matter pertaining to the duty of a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, or shall falsely take upon himself to act or officiate in any office or place of authority, he shall be punished," etc.

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The objection made by counsel for respondent is that the information does not charge any offense known to the laws of Michigan. The objection made is fatal to the conviction and judgment in this case. The section does not attempt to punish any person for falsely assuming to be any of the officers named in the section, but for assuming and taking upon himself to *act* as such, and also any person who shall falsely take upon himself to act or officiate in any office or place of authority. The information is fatally defective in not stating that Cronin falsely took upon himself to *act* as a member of the metropolitan police force of the city of Detroit. *Com. v. Wolcott,* 10 Cush. 61. Whether the information was good in other respects we do not decide.

The judgment must be reversed, the fine remitted, and the prisoner discharged.

The other Justices concurred.

Casper N. Dunham and Frank Treat v. Christopher A. Hough, Treasurer of Barry County.

Liquor traffic—Provision authorizing county treasurer to require new bonds, construed.

The specified causes for which new bonds might be required of liquor dealers by county treasurers, namely, "the death, insolvency, or removal of either of the sureties," were not illegally laid down in the liquor tax law of 1887, but no method was provided of getting at the facts by a hearing before any one; which defect would have been cured by Act No. 213, Laws of 1889, if it had become a law. *Robison v. Miner,* 68 Mich. 549.

Certiorari to review proceedings by respondent to

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determine whether a new bond should be required of a liquor dealer, under Act No. 213, Laws of 1889. Argued May 1, 1890. Proceedings quashed May 9, 1890. The facts are stated in the opinion.

Eggleston & McBride, for petitioners.

Clement Smith, Prosecuting Attorney (*L. E. Knappen,* of counsel), for respondent.

GRANT, J. Plaintiffs were saloon keepers in the village of Nashville, Barry county, and as such had executed the bond required by law. The defendant, who was the treasurer of said county, commenced proceedings under section 8 of pretended Act No. 213, Laws of 1889, for the purpose of determining whether one of the sureties upon such bond had removed from the county and had become insolvent, and whether, in consequence thereof, the plaintiffs should be required to execute a new bond. Notice of the hearing was given to plaintiffs by the treasurer. The plaintiffs appeared specially, and objected to the proceedings for reasons which it is unnecessary to state. The objection was overruled, and the treasurer proceeded to take testimony. The treasurer decided that the surety had become insolvent, and required the plaintiffs to execute a new bond. Plaintiffs bring the case into this Court, by *certiorari,* to test the validity of these proceedings.

We have already held at the present term, in the case of *Rode v. Wayne Co. Treasurer, ante,* 598, that, owing to stupidity or gross negligence, or for some other reason, the important bill regulating the traffic in intoxicating liquors in this State, which passed both Houses of the Legislature, was not engrossed and enrolled as it was passed, but that, as presented to the Governor for his signature, it was entirely different, in many of its pro-

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visions, from that which passed the Legislature, and that consequently this act, as published, is of no force or validity whatever. Our reasons are fully stated in that opinion.

We also held that Act No. 313, Laws of 1887, upon the same subject, was not repealed, and is still in force. If the similar provisions of the act of 1887 were valid, the question would then arise for our consideration whether this proceeding might not still be maintained. But this Court has passed upon the provisions of the act of 1887 concerning the same subject-matter in *Robison v. Miner*, 68 Mich. 549. It was there held that the specified causes for which new bonds might be required were not illegally laid down in the statute, but that no method was provided of getting at the facts by a hearing before any one. Such important powers cannot be exercised by the country treasurer arbitrarily, nor can he, at his discretion, determine the proceedings which are necessary to give him the jurisdiction to act. These can only be provided by the Legislature. The Legislature would have cured this defect by the act of 1889, if it had become a law

For the above reasons, judgment must be entered for the plaintiffs, and the proceedings quashed, but without costs.

The other Justices concurred.

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ROBERT WILDMAN AND ANDREW WILDMAN v. CHARLES STERRITT.

Replevin—Demand—Damages.

Plaintiffs sold a boiler and certain machinery, and retained the title until the property was paid for. The vendee, with their consent, removed the property to another county where he attached it to other machinery in such a way that there was nothing to designate it therefrom, and operated the *whole* in his business. An officer levied upon the *whole* property as that of the vendee, but did not remove it; and it is held that he could not be made liable in damages until after his refusal to deliver to the vendors their portion of the property upon due demand and identification.

Error to Alcona. (Simpson, J.) Argued April 25, 1890. Decided May 16, 1890.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Depew & Rutherford, for appellant, contended for the doctrine stated in the opinion.

Nolan & Morse, for plaintiffs, contended:

1. The property was not subject to attachment or execution by the creditors of the vendee, and plaintiffs had the right to take possession of it at any time under their contract; citing *Couse v. Tregent,* 11 Mich. 65.
2. Defendant nowhere claims any right to the possession of the boiler and machinery sold to the judgment debtor after a formal demand therefor. The jury found specially, at defendant's request, that defendant did unlawfully detain the property *after* such demand.

CAHILL, J. This is an action of replevin brought in the Alcona circuit court to recover a boiler and certain other machinery. The plaintiffs had judgment for the

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property, and $60 damages for the detention. The questions raised on this record relate to the damages recovered, the right of the plaintiffs to recover the property not being contested.

The defendant, at the time the suit was commenced, was sheriff of Alcona county, and claimed to hold the property by virtue of two executions issued from justice's court,—one at the suit of Richard P. Gustin and John Kilmaster against Zachariah T. Mason, for the sum of $156.75, and the other in favor of William Jenkins against Zachariah T. Mason, for $192.12. The property had been sold by the plaintiffs to Zachariah T. Mason, June 20, 1888, under a contract by the terms of which the plaintiffs were to retain the title until it was paid for, and Mason, not having paid anything upon the purchase price, the plaintiffs claimed the right to retake it under the contract. Mason had been permitted by the plaintiffs to take the property from Saginaw, where he bought it, to Kilmaster, in Alcona county, where he set it up, built a derrick-house about it, and attached other machinery to it for the purpose of boring a well.

The property seized by the sheriff included the property replevied in this suit, and a quantity of other property put up and used together with it by Mason, and the defendant claimed that he had no means of knowing what property the plaintiffs owned or claimed until it was designated and pointed out to him; and that, under those circumstances, he had a right to levy on all of the property found in the possession of Mason, the judgment debtor; that he was not a trespasser for including the plaintiffs' property until after the plaintiffs had designated and claimed their own property. The defendant claims, also, that this was not done until on the day when this suit was commenced. The defendant does not deny the right of the plaintiffs to recover the property without a

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demand, but he denies the right of the plaintiffs to recover damages against him for the detention of the property, except such as resulted after the demand; and he claims that there is no evidence in the case tending to show that he did any act which would have resulted in damages to the plaintiffs after such designation and demand were made.

In this position we think the defendant is correct. The bill of exceptions purports to set out all of the evidence, and we search it in vain for any legitimate testimony upon which to base the judgment for $60 damages. It is true one of the plaintiffs testified that he had been put to unnecessary trouble and expense in getting possession of the property; that it had been necessary for him to send a man five times to Kilmaster to see a sheriff in order to get possession of the property, and that his actual damages were about $125; but it does not appear that any of this expense was incurred after he had pointed out to the sheriff his property, and demanded it. In fact, no such damages could have resulted after such demand, and before suit was brought, because they occurred on the same day, and there is no evidence that the sheriff moved or disturbed the property after demand, and before suit was brought. The plaintiffs say that the $125 was made up of money spent in hiring a man to get possession of the property; that it was necessary to have a man of some knowledge and experience in the handling of such property, so as to handle it without injury; but it does not appear that the levy by the sheriff in any way increased such expenses. The plaintiffs had allowed Mason to take this property to Kilmaster, and there abandon it. If the levy had never been made, it would have been just as necessary for the plaintiffs to move their property, and the levy in no way increased such expense. So far as the record discloses, the defend-

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ant did no act beyond making his levy and taking possession of the property. He did not move it from the place where he found it.

On the trial, evidence was admitted, under objection, tending to show that the plaintiffs were obstructed and interfered with by certain persons, after the coroner had taken possession of the property under their writ. It did not appear that the defendant was in any way responsible for the conduct of these persons, and, if it had, it is doubtful whether any damages that resulted to the plaintiffs after the commencement of their suit could be recovered in this action.

The plaintiffs were permitted to read in evidence, against the objection of the defendant, the following letter:

"KILMASTER, MICH., Dec. 11, 1888.

"MESSRS. WILDMAN BROS:

"We will charge you $100.00 for the use of our railroad switch to ship out any machinery you may own at or near the same. This charge you shall pay in advance; otherwise you cannot use the switch.

"Yours, etc.,

"KILMASTER & Co."

This letter bears date six days after the commencement of this suit. We cannot see that it could have had any other purpose than to improperly influence the jury against the defendant. It should have been excluded.

Defendant asked the court to instruct the jury as follows:

"2. The plaintiffs can recover nothing for expenses and damages in this case that were incurred after this suit was commenced.

"3. As the property claimed in this suit was permitted by the plaintiffs to be put up and attached to other machinery, so there was nothing to designate the property claimed by plaintiffs from property owned by Mason, no damage can be recovered from the defendant till he

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had received a demand, and the property had been designated and pointed out to the defendant."

Both of these requests were refused. We think they should have been given. We do not think the sheriff can be made liable in this case for damages in levying upon the property of the plaintiffs which they had suffered the judgment debtor to so mingle with his own as to make it impossible for the sheriff to select it out and distinguish it from the plaintiffs' property. *Shumway v. Rutter*, 8 Pick. 447; *Lewis v. Whittemore*, 5 N. H. 366; *Bond v. Ward*, 7 Mass. 126; *Vose v. Stickney*, 8 Minn. 75; 2 Freem. Ex'ns, § 254. We think that the record fails to disclose any basis for the judgment of $60 damages, which was recovered.

The judgment must be reversed, and a new trial granted; defendant to recover costs of this Court.

The other Justices concurred.

SARAH CAMPBELL v. THE CITY OF KALAMAZOO.

Negligence case—Pleading—Evidence—Sidewalks—Notice of defects to municipality charged with duty of keeping same in repair—Opening by counsel to jury.

1. Objections to a declaration in a negligence case on the ground that it fails to point out the *exact* place of the accident should be taken by demurrer; and it is too late to raise them on the trial.
2. The declaration in a negligence case alleged that the sidewalk in front of certain premises, and upon which plaintiff fell and was injured, was out of repair; that the stringers were rotten; the planks loose; and the walk in an unsafe and dangerous condition. The exact place where plaintiff fell was not pointed out. The plaintiff's evidence fully supported these allegations,

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and showed that the defects had existed for a year and upwards. And it is held that the evidence was competent as tending to show notice to the defendant of the condition of the walk, and its negligence in allowing it to remain in such a condition.

3. Act No. 264, Laws of 1887, providing for the recovery of damages for injuries caused by defective sidewalks, does not require that the municipality charged with keeping sidewalks in repair shall have *actual* notice or knowledge of the defects complained of; nor does it materially change the rule upon this subject laid down in construing the statute of 1879; citing *Dotton v. Village of Albion*, 50 Mich. 129 (57 Id. 575); *Moore v. Township of Kenockee*, 75 Id. 332.

4. Act No. 264, Laws of 1887, expressly charges cities with the duty of keeping their sidewalks in repair, and provides for raising what money may be needed for that purpose within certain limits. The liability of such cities for a failure to perform this duty is expressly declared, and it is immaterial whether, under the provisions of their charters, they would be held so liable or not.

5. It would be a very narrow rule which restricted the opening statement of counsel to the jury to facts which should prove to be admissible in evidence under the strict rules governing the admission of testimony.

So *held*, where, in a negligence case for injuries sustained by reason of a defective sidewalk, counsel were permitted to state that the plaintiff would show that the *entire* walk in front of a designated residence was out of repair, and, if permitted by the court, that a walk on another street, on the westerly side of the same premises, was in like condition.

Error to Kalamazoo. (Buck, J.) Argued April 25, 1890. Decided May 16, 1890.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

James H. Kinnane and *Alfred J. Mills*, for appellant.

Howard & Roos, for plaintiff.

[The points of counsel are fully stated and discussed in the opinion, where the authorities are cited.—REPORTER.]

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CAHILL, J. The plaintiff was injured by a fall upon a sidewalk on Kalamazoo avenue, in the city of Kalamazoo, on May 21, 1889. The injury was caused by the plaintiff's stepping on a loose board, which flew up and tripped her. She claims to have been permanently injured, and on the trial secured a verdict and judgment for $3,200. The city brings error.

The first assignment of error relates to remarks made by counsel for plaintiff in his opening address to the jury. The error alleged is that counsel stated to the jury that he should offer to show upon the trial that the sidewalk in front of Mr. Stone's premises, where the accident occurred, had been out of repair for four or five years; also to the following remark of counsel:

"We will show you that the whole walk along in front of Mr. Stone's house, and, if the court will permit us, we will show that the walk around on Elm street, on the westerly side of his premises, were in the same condition."

This statement was objected to by counsel for defendant upon the ground that it would not be competent for plaintiff to introduce such proof. The court declined to interrupt counsel at that time, saying that the objection might be overruled for the present, and defendant's counsel excepted. When proof came to be offered on this subject, the court, after much discussion, said:

"I think that proof as to the condition of the walk on Elm street should be excluded, and I think the party may show the condition of the walk on Kalamazoo avenue, in front of the premises of F. S. Stone, for a period of a year or thereabout before this injury occurred," to which defendant excepted.

It is now alleged that the defendant was prejudiced by the remarks of the counsel made at the opening, because of his statement that he should prove the condition of the walk on Elm street, and also for four or five years

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preceding the accident, and that such injury was not cured by the refusal of the circuit judge to permit such proof to be made. This Court has had occasion in several cases to comment upon the latitude which counsel may take in their opening argument to the jury. In *Porter v. Throop*, 47 Mich. 313, it was said that an opening argument to the jury might be so unfair in its statement of facts, and so well calculated to prejudice the jury, as to justify setting aside a verdict obtained by the party making it; but it was said that a judgment would not be reversed for an unfair opening except in a very plain case. It is clear that some latitude must be allowed to counsel who are conducting a case in making their opening statement. It is their duty to make a full and clear statement of the facts which they expect to prove. It would be a very narrow rule which restricted them to a statement of such facts as should turn out to be admissible under the strict rules governing the admission of testimony. The statement of counsel amounts to little more than an offer to prove certain facts. We should need to be satisfied that the offer was not made in good faith before we reversed a case on that ground.

In *Scripps v. Reilly*, 35 Mich. 371, counsel for plaintiff was allowed to read in his opening to the jury certain articles which had appeared at different times in defendant's newspaper, for the purpose of showing malice. Some of these, when offered, were excluded, and others were not offered at all. In his charge the court warned the jury against the articles read by counsel in his opening which the court had excluded, but said nothing about the others which had been read, but had not been offered. This was held to have been error. This case does not come within the mischief there pointed out. We think the refusal of the circuit judge to stop plaintiff's counsel

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in his opening argument was not an abuse of the discretion which is necessarily vested in a trial court.

The next ground of error relates to evidence which was admitted to show the condition of the walk in front of Mr. Stone's premises. The defendant claimed that proof should have been confined to showing the condition of the particular place where the accident occurred. The plaintiff's declaration charges the negligence of the defendant in that it wrongfully and negligently allowed said sidewalk, and particularly—

"That portion of said sidewalk adjacent to the premises of F. S. Stone, to become and remain out of repair, torn up, and the planks thereupon to become and remain loosened, and the stringers thereof to become decayed and rotten, and the planks thereon to become rotten, and the nails therein rusted and broken, and generally to become and remain in an unsafe and dangerous condition, for a long time, to wit, for a space of three months or thereabout immediately prior to May 21, 1889, of all of which said defendant had due notice and knowledge."

The declaration further charges that, by reason of such sidewalk being in such unsafe and dangerous condition, torn up, and out of repair, as aforesaid, the plaintiff stumbled, fell, and was suddenly thrown down, and received serious injuries. It will be seen by this extract from the declaration that the negligence of the defendant was alleged to consist in the fact that the entire sidewalk in front of the premises in question was old and out of repair, and no attempt was made in the declaration to point out the specific defect which was claimed to have caused the injury. If the declaration had been demurred to, it is possible that it might have been held that it was not specific enough in this respect. But this was not done. Objections to the declaration on the ground that it did not point out the exact place of the accident with sufficient particularity should have been taken by demurrer. It is too late to take them on the

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trial. *Jackson v. Collins*, 39 Mich. 557; *Wilcox v. Railroad Co.*, 43 Id. 584 (5 N. W. Rep. 1003); *Pettibone v. Maclem*, 45 Id. 381 (8 N. W. Rep. 84); *Bauman v. Bean*, 57 Id. 1 (23 N. W. Rep. 45); *Geveke v. Railroad Co.*, Id. 589 (24 N. W. Rep. 675). We are not called upon to say on this record that the declaration was not as specific in this respect as the circumstances of the case would admit. When an entire piece of sidewalk in front of a particular lot is out of repair, and, by reason of its age and decayed condition, is no longer safe or fit for use, it might be difficult, where many planks are loose and decayed, for a plaintiff to point out the particular one over which she stumbled and fell. The evidence offered by the plaintiff supported the declaration upon this point, and was not disputed. It appeared without controversy that the walk in question was generally out of repair; that the stringers were rotten, so that the nails would not hold; that the boards which were laid crosswise would, many of them, fly up when stepped upon; and this condition was shown to have existed for a year and upwards. We think such testimony was competent for two purposes:

1. It showed the negligence of the defendant as charged in the declaration.

2. It tended to show notice to the defendant of the condition of the walk. *Armstrong v. Town of Ackley*, 71 Iowa, 76 (32 N. W. Rep. 180); *Noyes v. Gardner*, 147 Mass. 505 (18 N. E. Rep. 423).

It is urged that the admission of this testimony was erroneous within the rules laid down by this Court in *Dundas v. City of Lansing*, 75 Mich. 499, and in *Tice v. Bay City*, 78 Id. 209. But we think the case is easily distinguished. In the *Lansing Case* the defect pointed out in the declaration was a broken plank over a culvert, leaving a hole 6 to 8 inches wide, and 18 inches long. This was the particular defect complained of. The plaintiff introduced evidence tending to show the con-

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dition of the walk for a block or more each way from this particular defect. In the *Bay City Case* the defect complained of was a particular hole large enough to admit the plaintiff's foot. Evidence was offered by the plaintiff of other similar holes in the walk, but at points in no way connected with the place of the accident. In both these cases the particular defect which caused the accident was clearly pointed out in the declaration, and no other negligence was relied on. It was held that proof must be confined to the existence of the defect complained of. The declaration in this case, as we have seen, is different. The negligence of the city is more broadly charged, and we do not think it was error to allow the negligence to be proved as laid.

The defendant asked the court to instruct the jury that under the act of 1887, upon which this case was based, the plaintiff must show that the city had actual notice or knowledge of the defect complained of. In this the defendant's counsel were in error. We held in *Moore v. Township of Kenockee*, 75 Mich. 332, that when it is generally known that a bridge has become decrepit, or when it has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed to take action on the ground of having no actual notice of the dangerous infirmity. In *Dundas v. City of Lansing, supra*, it was held that testimony tending to show that the defect in the cross-walk was in plain sight, and obvious to any person passing along the street, and that it had existed for six months, justified the jury in finding that the city had notice of the defect and dangerous condition of the cross-walk. We do not think the statute of 1887 materially changes the rule upon this subject from what we had held it to be under the statute of 1879. The liability of a municipal corporation for negligence has never been held to exist

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without proof or knowledge of notice of the defect. In such case, the basis of the action being negligence, notice of the defect which caused the injury, or of facts from which notice may reasonably be inferred, has always been held essential to liability. 2 Dill. Mun. Corp. § 1024; *Dotton v. Village of Albion,* 50 Mich. 129.

A distinction was urged upon us at the argument by counsel for defendant between this case and those arising in other cities which have been before us. The supposed distinction is based upon the provisions of the defendant's charter. From these provisions, it is urged that the city of Kalamazoo is not charged with the duty of repairing, or keeping in repair, the sidewalks within its limits, and that it has no authority to raise a tax therefor, or pay out any money for that purpose. We do not find it necessary to construe the charter of the city of Kalamazoo in determining its liability to this action. Whether, under the provisions of its charter, it would be liable or not, is immaterial. The act of 1887, under which this action is brought, expressly puts upon the defendant, with other cities, the duty of keeping its sidewalks in repair. Provision is made for raising what money may be needed for that purpose within certain limits, and the liability of the city for a failure to perform this duty is expressly declared. This act has been held constitutional in all of its material provisions, and must govern this case.

Some other questions are raised on the record, which we have examined, but we do not need to discuss them.

The judgment is affirmed, with costs.

The other Justices concurred.

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THE COMMISSIONERS OF PARKS AND BOULEVARDS OF THE CITY OF DETROIT v. THE COMMON COUNCIL OF THE CITY OF DETROIT ET AL.

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Belle Isle bridge—Custody and control of.

1. The charter of the city of Detroit divides the powers of local government into two departments,—legislative and administrative. The legislative authority is vested in the common council, and the administrative powers are conferred upon the mayor and different agencies, such as the board of public works, board of water commissioners, and the commissioners of parks and boulevards.
2. The common council of the city of Detroit has *full* control over Belle Isle bridge, which was constructed pursuant to an act of Congress approved July 20, 1886 (24 U. S. Stat. at Large, 147). Such control must be exercised through ordinances, duly enacted for that purpose, which may provide all needful rules and regulations for the use of the bridge and the approaches, and may authorize the hiring of such employés in and about the bridge as the council deem expedient, and may fix their compensation.
3. So much of section 11 of Act No. 388, Local Acts of 1889, as confers upon the commissioners of parks and boulevards the authority to make all suitable and needful rules and regulations respecting the use of Belle Isle bridge and its approaches by foot-passengers, etc., cannot be upheld, as it places in the hands of an administrative body legislative authority which is vested by the charter in the common council of the city of Detroit.
4. The commissioners of parks and boulevards of the city of Detroit are the proper administrative body to have the custody and control of Belle Isle bridge, under the general direction of the common council of the city, as exercised through ordinances enacted for that purpose, and to that end may hire the necessary employés, who are subject to the supervision and control of said commissioners.

Mandamus. Submitted April 29, 1890. Granted, in part, May 16, 1890.

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Relators applied for *mandamus* to compel the common council of the city of Detroit to rescind their action in the appointment of their co-respondents as superintendents, etc., of Belle Isle bridge, and to turn over its control to relators. The facts are stated in the opinion.

Dickinson, Thurber & Stevenson (*Don M. Dickinson*, of counsel), for relators.

John W. McGrath, for respondents.

[The points of counsel are fully stated and discussed in the opinion.—REPORTER.]

LONG, J. This is a petition for *mandamus* to compel the common council of the city of Detroit to rescind and set aside their action appointing certain persons, who are also made parties hereto, as superintendent, assistant superintendents, engineers, assistant engineers, gate-tenders, and sweepers of Belle Isle bridge and its approaches, and to turn over the possession and control of said bridge to the relators, and also commanding such superintendent, assistant superintendents, engineers, assistant engineers, gate-tenders, and sweepers to surrender their positions so held by them under the action of the common council.

Upon filing the petition in this Court, an order to show cause was issued, and the parties have all appeared and answered. Substantially the facts set out in the petition are admitted; the controversy between the parties being purely questions of law arising out of the construction of the statute of the United States authorizing the construction of the bridge over the navigable waters of the Detroit river, and the statutes of this State authorizing the common council of the city of Detroit to borrow money for its construction, and appointing the commissioners of parks and boulevards. The act of Congress

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(24 U. S. Stat. at Large, 147) was approved July 20, 1886, and reads as follows:

"An Act to provide for the construction of a bridge across the west channel of the Detroit river to connect Belle Isle park with the main-land.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the assent of Congress is hereby given to the municipality known as the 'City of Detroit,' a body corporate existing by and under the laws of the State of Michigan, to erect a bridge across the Detroit river between any point on the north-western bank of said river within the limits of said corporation aforesaid, and the island in the Detroit river heretofore known as 'Belle Isle,' and now known and designated as 'Belle Isle Park,' the said bridge to be devoted to such general use as may be prescribed by the municipal authorities of the city of Detroit.

"SEC. 2. That the bridge authorized to be erected by this act shall be so located and constructed that the channel of said Detroit river shall not be unreasonably obstructed, but that a draw or pivot span of not less than one hundred and twenty-five feet clear opening on each side of the pivot-pier shall be located over the above-specified channel, in such a manner that one or both of the openings of said draw or pivot span can be conveniently and safely reached and passed by boats pursuing the ordinary channel of the river; that one opening, at least, of a draw or pivot span shall be over the best and most convenient channel of the river for such classes of river traffic as shall find it convenient to use said channel.

"SEC. 3. That the height at which said bridge shall be constructed above the surface of the river shall be such as may be approved by the Secretary of War.

"SEC. 4. That all draw or pivot spans authorized by this act shall be operated by steam or other reliable mechanical power, and shall be opened promptly upon such signals as are now prescribed by law for the passage of boats through draw or bridges, and such other and further regulations as may be prescribed in the premises.

"SEC. 5. That piers upon which said bridge is built shall be parallel with the current of the river, and so as to avoid producing cross-currents or bars dangerous to navigation; and if, after construction, any piers are found to produce the above-mentioned effects, the nuisance shall be abated or corrected by, or at the expense of, the corporation owning or operating said bridge, and when advised by the Secretary of War.

"SEC. 6. That it shall be the duty of the municipal corporation authorized to erect a bridge under this act to maintain, at its own

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expense, from sunset to sunrise of each day throughout the season of navigation, and during heavy fogs, such lights on the bridge as may be required by the Light-house Board, for the security of navigation.

"SEC. 7. That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post-route, over which the mails, troops, and munitions of war of the United States may be transported at no higher charge than is made for transportation of said mails, troops, and munitions of war over railroads and public highways leading to said bridge; and the United States shall have the right of way for postal telegraph lines and appliances across said bridge.

"SEC. 8. That before commencing work on the bridge contemplated in this act it shall be the duty of the municipal authorities of the city of Detroit, to submit to the Secretary of War, for his examination, a design and drawing of the bridge and piers, and a map of the location, giving, for the space of one-half mile above and one-half mile below the proposed location, the topography of the banks of the river, the shore lines at high and low water, the direction of the current, and soundings showing accurately the bed of the stream, and such other and further information as the Secretary of War may require for a full and satisfactory understanding of the subject.

"SEC. 9. That, when the Secretary of War is satisfied that the provisions of this act have been complied with in the matter of location and the submission of plans, the building of the piers may at once commence; but, if it shall appear that the conditions prescribed by this act cannot be complied with at the location where it is desired to construct the bridge, the Secretary of War shall, after considering all remonstrances filed against the building of said bridge, and furnishing copies of remonstrances to the board of engineers provided for in this act, detail a board of experienced engineers from the engineer corps of the United States army to examine the case, and may, on their recommendation, authorize and direct such modifications as appear necessary.

"SEC. 10. That the Secretary of War may, in his discretion, appoint one or more army engineers to supervise and personally examine the construction of said bridge; and that the proposed bridge shall only be a lawful structure when built as approved by the Secretary of War, who shall have authority, by and with the advice of the engineers detailed by him, to order such change in construction or appliances as he may deem necessary for the safety of said bridge and the convenience of navigation.

"SEC. 11. That in case of any litigation from any obstruction, or alleged obstruction, to navigation, created by the construction of any bridge under this act, the cause or question arising may be

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heard by the district court of the United States of any state in which any portion of said obstruction or bridge touches.

"SEC. 12. That the municipal laws and ordinances of the city of Detroit may be enforced on said bridge, and the care, control, and the use of the same shall be governed by ordinances of the city enacted, as though said bridge was a public street in said city.

"SEC. 13. That the right to alter, amend, or repeal this act, and to require the removal of material obstructions to navigation, by the construction of any bridge under its provisions, is hereby expressly reserved, without any liability of the government for damages on account of such alterations, amendment, or repeal, or on account of the prevention, or the requiring of the removal of any such obstruction; and if any change be made in the plan of any bridge constructed under this act, during the progress of the work thereon, or before the completion of said bridge, such change shall be subject to the approval of the Secretary of War; and any change in the construction, or any alteration of any such bridge, and the removal of any such obstruction, that may be directed at any time by Congress or the Secretary of War, shall be made at the cost and expense of the owners of the said bridge."

It appears that on May 21, 1889, George H. Russell, William Livingstone, Jr., John Erhard, and William K. Parcher were appointed by the common council, on the nomination of the mayor, commissioners of parks and boulevards, in accordance with an act (No. 388, Local Acts of 1889) entitled—

"An act supplemental to the charter of the city of Detroit, and relating to parks, boulevards, and other public grounds in said city, and to repeal act number three hundred and seventy-four of the Local Acts of 1879, entitled 'An act to provide for the establishment and maintenance of a broad street or boulevard about the limits of the city of Detroit, and through portions of the townships of Hamtramck, Greenfield, and Springwells, in the county of Wayne,' approved May 21, 1879."

The commissioners duly qualified under the act, and entered upon the discharge of their duties. On August 12, 1889, the common council, assuming authority over the commission in the custody and control of the bridge connecting Belle Isle park with the main-land of the city (which bridge had then been constructed, as will be

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noted hereafter), without the assent or concurrence of the commission, and against their protest, formally appointed for the bridge one superintendent, one assistant superintendent, one engineer, four assistant engineers, four gate-keepers, and two sweepers, fixing, in detail, their salaries, which aggregate $11,300. These persons at once entered upon the bridge, and have ever since maintained and held possession thereof, adversely to, and to the exclusion of, the commissioners. The commissioners continued to be excluded from the custody of the bridge, and made formal demand upon each of the persons appointed by the council that they surrender and deliver to them its custody and control. They also petitioned not only the council as then organized, but after the election and organization of the new council, on January 21, 1890, presented a formal petition to that body, setting forth their claims, and asking that the action of the council appointing such persons be rescinded, which was refused. The commissioners claim that such rights are conferred upon and vested in them by the provisions of the act of 1889, before cited.

Section 11 of this act, and the other sections here mentioned, are the ones under which the commissioners claim:

"SEC. 11. The bridge connecting Belle Isle with the main-land and its approaches shall, for the purposes of this act, constitute a part of Belle Isle park, and said commissioners shall have the custody and control of the same, subject to the general directions of the common council. Said commissioners may make all suitable and needful rules and regulations respecting the use of said bridge and its approaches by foot-passengers, by animals and vehicles of every kind, including railway cars, engines, or motors, and may prohibit the use of such bridge by such persons, animals, cars, engines, or motors, as in their judgment may be injurious to the proper use of said bridge or park. They may appoint the necessary engineers or bridge-tenders, and provide for the payment

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of their compensation. But the making of repairs and the maintenance of said bridge shall be under the direction and supervision of the appropriate [department] departments of the city government, and subject to the authority of the common council, and the expense thereof shall not be made a charge upon said park fund."

Sections 6 and 7 of the same act, so far as they bear on the questions here, read as follows:

"SEC. 6. The commissioners shall have the control and management, and shall have charge of, the improvement of all the parks and public grounds of said city, including the Island park (known as 'Belle Isle Park'), and of such parks or public grounds as may hereafter be acquired, laid out, purchased, or dedicated for public use in said city. * * * * * * * * * * *

"SEC. 7. The said commissioners may make all needful rules and regulations for the management, maintenance, and care of the said parks, public grounds, and boulevard or boulevards, and regulate their use, and the common council of said city may provide, by ordinance, for the observance of the same, and may also, in like manner, provide for the observance and enforcement of any other rules and regulations duly made by said commissioners, under any of the provisions of this act. And said common council may, by ordinance, provide for the preservation and protection of the parks, public grounds, and boulevards, and any of the property in charge of said commissioners, against any destruction or injury, * * * and prevent any disorder or disturbance. * * * Said ordinances may provide for the punishment for any breach or violation of any of their provisions. * * * The commissioners of metropolitan police for the city of Detroit, upon the request of said 'Commissioners of Parks and Boulevards,' shall detail for service, in any of the grounds under the charge of said park and boulevard commissioners, so many of the police force as may be necessary to maintain order and protect the property thereon, and any policeman on duty on said grounds may remove therefrom any person who may violate any of the rules and regulations of said commissioners, or of any of the ordinances of said city, adopted as aforesaid, relating to said parks, public grounds, or boulevards."

Some 10 years prior to this act, and under an act of

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the Legislature approved May 27, 1879, the city of Detroit was authorized to purchase Belle Isle, and erect and maintain a bridge over the American channel between the island and the main-land; and under chap. 11, § 7 (Local Acts of 1883, p. 627), of an act to provide a charter for the city of Detroit, and to repeal all acts and parts of acts in conflict therewith, approved June 7, 1883, the said common council was authorized to borrow money "for the purpose of constructing a highway by bridge or tunnel, with suitable draws, sites, and approaches over or under the Detroit river:" provided, that all of said improvement bonds, issued for the purpose above expressed, of bridging the American channel of the Detroit river to Belle Isle, if the same shall have been or may be authorized by an act of the Legislature of this State, shall not exceed the sum of $500,000. Charter and Laws of City of Detroit, 1886, p. 120, § 7. The original board of park commissioners was created by an act (No. 246, Local Acts of 1883), approved March 28, 1883. Charter of Detroit, 242.

The contention and argument of counsel for the relators is that, under these legislative acts and the charter of the city of Detroit, this power of control is conferred upon the relators. This is based largely upon the construction of section 11 of the legislative act above set forth, and particularly upon the following words of that section:

"The bridge connecting Belle Isle with the main-land and its approaches shall, for the purposes of this act, constitute a part of Belle Isle park, and said commissioners shall have the custody and control of the same, subject to the general directions of the common council. Said commissioners may make all suitable and needful rules and regulations respecting the use of said bridge and its approaches by foot-passengers. * * * They may appoint the necessary engineers or bridge-tenders, and provide for the payment of their compensation."

The position of the relators is that the words, "gen-

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eral directions of the common council," mean nothing more than would be implied if the words were not used; that they refer to the exercise of legislative power; and, in any view, cannot be attached to the subsequent and independent provisions for the exercise of a judgment as to the needs of any assistants, and, finding that, then for the appointment of engineers and bridge-tenders by the commissioners in the exercise of their administrative functions. That the charter itself provides that—

"The powers of local government possessed by said city are divided into two departments,—the legislative and administrative. No person or body belonging to one department shall exercise powers properly belonging to the other, except in cases expressly provided in this act." Charter of Detroit, 1886, p. 10 (Local Acts of 1883, p. 580, § 2).

That the care and custody of, and the keeping of, the conditions imposed by the act of Congress upon the permission to build a bridge, are administrative acts. That, in the theory of the park and bridge act, the board of commissioners may themselves perform all the duties of custodians, care-takers, and engineers without employing assistants; and that it is only when, on their responsibility and judgment, it shall be necessary to have assistants, that they may call in these aids. That is, that the relators having been nominated by the mayor, and confirmed by the council, it is an appointment by the council to the principal office of having the care, custody, and control of the bridge, with power under the statute to make all needful rules and regulations respecting the use of the bridge and its approaches, and to appoint the necessary engineers or bridge-tenders, and provide for the payment of their compensation, and that the council now seek to supersede the necessary and essential attribute of the commissioners' authority to the proper custody and control thereof, or, as counsel for relators expresses it,

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"the council in due form elect the board to an office, and then deny the office to its own appointee."

It is, on the other hand, contended by the respondents that the bridge was constructed by the city of Detroit under a grant of authority from the general government, and that by such grant the common council of the city of Detroit was vested with the care, custody, and control of said bridge; that the boulevard referred to in the petition terminates at the northerly line of Jefferson avenue, and does not extend to the northerly end of the bridge; that the northerly end of the bridge is over 300 feet southerly from the southerly line of Jefferson avenue; that the city of Detroit is the owner in fee, acquired by purchase, of a strip of land 150 feet in width, and extending from the southerly line of Jefferson avenue to the northerly end of said bridge; that said strip of land is not a public street or public highway, and not a part of the boulevard, and has never been declared by the council to be a part of the boulevard, or a public street or highway; that the act of the Legislature under which the relators claim to act is unconstitutional and void; that section 11 of the act above referred to, and certain sections of which are above set out, and under which the commissioners claim the care, custody, and control of the bridge, is ambiguous, inconsistent, inoperative, unconstitutional, and void, and that the common council cannot be divested of the custody, care, and control of the bridge in this proceeding. Counsel for respondents refers to certain sections of the act of Congress authorizing the construction of the bridge as sustaining these views. Attention is called to section 12, which provides:

"That the municipal laws and ordinances of the city of Detroit may be enforced on said bridge, and the care, control, and the use of the same shall be governed by ordinances of the city enacted, as though said bridge was a public street in said city."

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It is further contended that, the Detroit river being a navigable water-way of the United States, it is within the jurisdiction of the United States government, which has custody and control over it, and that the act of Congress passed in 1886, granting to the city of Detroit the right to bridge it, also provided that the bridge should be devoted to such general use as may be prescribed by the municipal authorities of the city of Detroit. It is therefore argued by counsel that it was the evident intent of Congress that the bridge should be governed by the ordinances of the city, as though it was a public street, and, that its care and control is vested in the ordinance-making body, and that this power involves, of necessity, the power to appoint, govern, and control these very offices; that under the law creating this commission it is an independent body, subject to no ordinance, nor can any duty be imposed upon it by ordinance, and that its acts are not subject to review by any person or body, there being no power vested anywhere to remove any member for any cause. Substantially, these are the claims of the parties as presented by counsel.

The learned counsel for the relators has presented with great clearness and force, in oral argument, as well as by his printed brief, the reasons for the construction of these various acts for which he contends. We cannot, however, view the case as falling within the principles for which he contends. The federal act was passed in 1886, and expressly provided that the municipal laws and ordinances of the city of Detroit may be enforced on said bridge, and that the care, control, and use of the same shall be governed by the ordinances of the city enacted as though said bridge was a public street in said city.

[1] Counsel for respondents cited *Park Commissioners v. Common Council*, 28 Mich. 243, 248; *Attorney General v. Common Council*, 58 Id. 226.

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It was the plain intent of Congress, in granting permission to construct it, that the same should be and continue a public highway, and be known as a "post route," over which the mails, troops, and munitions of war of the United States may be transported, and the right of way for postal telegraph lines and appliances across it was reserved. The right was also reserved to make alterations in the construction, under the direction of Congress or the Secretary of War, at the expense of the owners of the bridge. It is not only regarded as a public highway, and under the act of Congress the care, control, and use of it to be governed by the ordinances of the city of Detroit, but it is a highway over a navigable water-way, and the bridge as a highway to be operated with reference to this water-way, and yet it is contended that the Legislature could, and did by this act of 1889, relieve the municipality from the performance of the conditions imposed by the act granting the franchise, and has conferred the absolute power and control of the bridge upon the commissioners of parks and boulevards, giving them the right and power to make all suitable and needful rules and regulations respecting the use of said bridge and its approaches, by foot-passengers, by animals and vehicles of every kind, including railway cars, engines, or motors, and to prohibit the use of such bridge by such persons, animals, cars, engines, or motors as in their judgment may be injurious to the proper use of said bridge or park, with absolute power of appointment of engineer, etc.

The charter of the city of Detroit divides the powers of local government over that municipality into two departments,—legislative and administrative. The legislative authority is vested in the common council. That body is not vested with administrative powers. These are conferred upon the mayor and different agencies, such as

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the board of public works, board of water commissioners, and other agencies, specified in the charter, among which is the commissioners of parks and boulevards. The common council have full control over the bridge in question, but that control must be exercised through ordinances duly enacted. When they have exercised their legislative functions, the execution or administration of their ordinances passes to the administrative agencies of the municipality. They may make all needful rules by way of ordinances duly enacted, and regulations for the use of the bridge and the approaches, and by ordinance authorize the hiring of such employés in and about such bridge as they deem expedient, and fix their compensation.

In so far as the act of the Legislature trenches upon the legislative power of the council it is ineffectual. The clause that confers upon the commissioners the authority to make all suitable and needful rules and regulations respecting the use of said bridge and its approaches by foot-passengers, etc., cannot be upheld, as it places in the hands of an administrative body legislative authority which is vested in the common council. The commissioners are the proper administrative body to have the custody and control of the bridge, under the general direction of the common council, and as such they are an agency of the municipality, as much as the board of public works, in carrying out the supervision and control of streets under ordinances of the common council. The employment of engineers and bridge-tenders is an administrative function, and not legislative.

It is to the municipality known as the city of Detroit that Congress gave its consent to erect the bridge in question. The act of Congress makes it the duty of the municipal corporation to erect the bridge and maintain it at its own expense. To perform this duty, the common council must enact ordinances to that end, and the

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administrative branch of the municipality must see that they are executed. The municipal laws and ordinances enacted by the common council are to be enforced on said bridge, not by the common council as a body, but by the administrative branch of the city government, and so the care, control, and use of the bridge is to be governed by ordinances enacted by the common council as though the bridge was a public street in the city. This does not contemplate that the common council shall take upon themselves the employment of engineers and care-takers, but that they shall enact ordinances respecting the care, control, and use of the bridge, to be enforced and carried out by the administrative branch upon whom the charter has conferred the authority so to do.

We are therefore of the opinion that a peremptory writ of *mandamus*, directed to the common council of the city of Detroit, do issue, directing and commanding it to relinquish all administrative power and authority over said Belle Isle bridge and its approaches, and to set aside and vacate by appropriate action the appointment of the persons named in the petition as employés upon and about such bridge, and permit the commissioners of parks and boulevards to exercise custody and control over the same, under ordinances enacted and to be enacted by the common council for the management, preservation, and protection of said bridge and its approaches, and the use, management, and maintenance thereof, and prescribe the maximum number of employés upon said bridge, and their duties, and giving the maximum compensation which may be paid such employés; and if the common council fail or neglect to enact such ordinances, or until said council shall enact such ordinances, the commissioners of parks and boulevards may adopt such reasonable rules and regulations as said council may approve in and about the use of said bridge and its approaches.

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And the said August Lemmer, Frank Blaimaister, Charles Forbes, John Tracy, Baltis Martin, Michael Kilcline, William Halloran, Stephen Murphy, Joseph Deidrich, Angelis Verlinden, Fred Erhard, Jerry Monyhan, and Frank Kelos are hereby directed and commanded to surrender to said commissioners of parks and boulevards the actual custody and possession of said bridge and its approaches; and it is declared that such persons last above named are subject to the supervision and control and employment of said commissioners of parks and boulevards, as the administrative agency of said municipality in enforcing the ordinances enacted by said common council in and about the care, custody, and control of said bridge and its approaches. No costs are to be awarded to either party.

CHAMPLIN, C. J., GRANT and CAHILL, JJ., concurred with LONG, J.

MORSE, J., (*dissenting*). It is very clear to me that the writ of *mandamus* ought to be denied in this case. It is plain, from the opinion of the majority of the Court, that the main intent of the Legislature in making this bridge a part of Belle Isle park is nullified because of its contravention not only of the conditions imposed by the federal government in the act of Congress giving assent to the building of the bridge, but also because of its encroachment upon the legislative power and authority of the municipality of the city of Detroit, which power, under our system of government, must be exercised through and by its common council. When the administrative power only is left valid in the legislative act, the act is not only shorn of its strength and emasculated, but it becomes really a new act, and one created by this Court, and not by the Legislature. It is plain

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as day that the Legislature, by section 11 (Act No. 388, Local, 1889), undertook and intended to give exclusive control of this bridge to the park and boulevard commissioners. It is provided that—

"Said commissioners shall have the custody and control [of said bridge], subject to the general directions of the common council. Said commissioners *may make all suitable and needful rules and regulations* respecting the use of said bridge and its approaches by foot-passengers, by animals and vehicles of every kind, including railway cars, engines, or motors, and may *prohibit* the use of such bridge by such persons, animals, cars, engines, or motors, *as in their judgment* may be injurious to the proper use of said bridge or park. They may appoint the necessary engineers or bridge-tenders, and *provide for the payment of their compensation.*"

The commissioners evidently understand the grant of power intended by the Legislature in this section, and they come into this Court asking that the *absolute* control, care, and custody of this bridge be at once surrendered into their hands. The clause in section 11, which provides that the custody and control shall "be subject to the general direction of the common council," amounts to nothing. When the whole section is taken into view, and its provisions construed together, as it must be, what is there left for the council to direct? Nothing at all. Every power connected with the bridge or its use is placed in the commissioners. They are to make the rules and regulations governing its use and control, and no person, animal, or vehicle can pass over it without their consent, or in any other way than they may direct. There is the appointment and discharge of all the care-takers and employes about the bridge, and the fixing of the number of such employes and their compensation. It is no longer a highway, but a park. But, in view of the federal statute, this bridge must be

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considered a highway, and be governed as other highways and streets are governed and controlled by the city of Detroit. My brethren, in effect, concede this.

If the legislative act is to be construed as invalid when it undertakes to confer legislative power upon the commissioners, and such commissioners have only administrative functions to perform as regards this bridge, what is there left of this section 11? What power can the commissioners exercise under the construction put upon it by this Court? They become a mere agency of the city, and as such agent can name the employes, and see to it that the rules and regulations enacted by the common council are enforced. The bridge is to be considered a public street, and not a park or boulevard. And the inconsistency of this construction of the statute is seen when we look at section 6 of the act, creating these commissioners, which provides that they shall have no control over ordinary streets or alleys. Local Acts of 1889, § 6, p. 609. Their control extends only over parks and boulevards, and, if this bridge is to be treated as a public highway, the commissioners have no business with it. And over parks and boulevards they are given absolute control, and the common council cannot interfere with them if the act is valid which I doubt. Id. § 2, pp. 607, 608. The Legislature, in making this bridge a part of Belle Isle park, evidently intended to give the commissioners the same power and control over this bridge as they did of the parks and boulevards. But, under the construction of this Court, the commissioners cannot even fix the number of employes on the bridge, or the compensation to be paid them. Instead of being masters of the bridge as a park, as enacted and intended by the Legislature, they are made the servants of the common council, with only one poor privilege, to wit, the naming of the persons who shall wait on the bridge.

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This holding is not only inconsistent and at variance with the act of the Legislature, but against that public policy, which makes it desirable always that the employe shall be selected by the employer. The commissioners can now make no suitable "or needful rules and regulations," nor can they prohibit any person, animal, or vehicle passing over the bridge, nor can they provide for the payment of the engineers and bridge-tenders. So much of section 11 is declared invalid by this Court that there is nothing left of it that can stand under any rule. It is not to be supposed for one moment that the Legislature would have passed this section 11 if it had contained only the provision that the commissioners might appoint the engineers and bridge-tenders, yet that is all that is now left them, except that they may have some policemen detailed to see that the rules and regulations of the common council are enforced.

I fully agree with my brethren as to the effect of the federal act of assent to the building of this bridge, and that the Legislature, in view of it, cannot confer any legislative power over this bridge; but I am further satisfied that the Legislature can neither make it a park nor boulevard, nor give the commissioners any right to interfere in any manner with it, except in so far as the common council of the city of Detroit may permit such interference. And as the city of Detroit, through its proper agencies, must keep this bridge in good repair, and in a reasonably safe condition for public travel, and be responsible under the laws of this State for all damages occurring through a neglect of its duty in this respect, it seems to me better policy that the employes upon this bridge should be appointed and discharged by the common council, a body much nearer the people than a board which is not directly responsible to them, or easily reached by the people, if they go wrong.

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Head-note references are to pages. Where there are several notes on a page, the number of the note is added in parenthesis, unless the reference is to all.

Cross-references are to *subjects*, and the same rule is followed as to giving *number* of head-note.

ABANDONMENT OF CONTRACT—See CONTRACT (1, 2); REQUESTS TO CHARGE (2).

ACQUITTAL—See CRIMINAL LAW (3).

ACTION.

An action for consequential damages sustained by a land-owner by reason of the diversion of water onto his lands by the action of a drain commissioner in opening a tunnel and maintaining it as a public drain, which damage occurred some three years after such opening, cannot be maintained against a contractor who performed such work, no permanent damage being done to the freehold which the discontinuance of such flowage would not remove. 100 (1).

ADVICE OF COUNSEL—See MALICIOUS PROSECUTION (2).

AFFIDAVIT—See CERTIORARI (2, 3).

AMENDMENT—See BILL OF PARTICULARS; JUSTICES' COURTS (4); STATUTE OF AMENDMENTS.

APPEAL—See ESTATES OF DECEASED PERSONS.

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ARBITRATION.

1. An agreement to submit *all* matters in controversy between parties to arbitration, and thus oust courts of their jurisdiction, is void, and may be repudiated by either party at any time before an award is made. 116 (4 *b*).
2. Either party to an arbitration may revoke the authority of the arbitrator, and this he may do notwithstanding the agreement to arbitrate is valid. 117 (*c*).
3. The case of *Nurney v. Insurance Co.*, 63 Mich. 683, is not understood as holding that an agreement to submit the ascertainment of unliquidated damages to arbitration, as a condition precedent to bringing suit, is invalid, or that either party thereto can revoke it at his own will; but that the right to such arbitration, upon the facts in that case, was waived, which waiver necessarily left the parties in the same situation as if no such agreement had been made, which is understood to be the doctrine of that case; and, if it was intended to establish a different rule, it is hereby expressly overruled. *Id.* (*d*).

ASSAULT AND BATTERY—See DAMAGES (1); EVIDENCE (19, 20); JURY.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Upon application to the chancery court to exercise its supervisory powers over common-law assignments, the assignment becomes a civil proceeding pending in the circuit court, and is subject to be transferred under How. Stat. §§ 6495–6502, which provides for the transfer of suits from one circuit to another where the presiding judge is disqualified to sit in the cause. 200 (1).
2. The following general propositions are summarized from the opinion of Chief Justice CHAMPLIN:

   a—It was the intention of the Legislature to place common-law assignments fully under the control and supervision of the circuit courts in chancery.

   b—From the time of the filing of the assignment in the office of the clerk of the court it may be said to be a proceeding pending in that court, for all the purposes of the act.

   c—The authority of the court to exercise its supervisory powers is called into being whenever application is made by

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ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued.
any one authorized by the act to invoke such powers, and then the power of the court, which was before dormant, is called into activity, and its jurisdiction fully attaches to the assignment, and all matters connected therewith.

d—This term "proceedings," as used in the statute, includes all matters connected with or attending the exercise of the power conferred upon the circuit courts in chancery which are necessary to enable the court to exercise its superintending control and authority conferred by the statute. *Id.* (2).

ATTACHMENT SUIT—See MINING CORPORATIONS (3, 4).

ATTORNEY GENERAL—See CRIMINAL LAW (1, 2).

BELLE ISLE BRIDGE.

1. The charter of the city of Detroit divides the powers of local government into two departments,—legislative and administrative. The legislative authority is vested in the common council, and the administrative powers are conferred upon the mayor and different agencies, such as the board of public works, board of water commissioners, and the commissioners of parks and boulevards. 663 (1).
2. The common council of the city of Detroit has *full* control over Belle Isle bridge, which was constructed pursuant to an act of Congress approved July 20, 1886 (24 U. S. Stat. at Large, 147). Such control must be exercised through ordinances, duly enacted for that purpose, which may provide all needful rules and regulations for the use of the bridge and the approaches, and may authorize the hiring of such employés in and about the bridge as the council deem expedient, and may fix their compensation. *Id.* (2).
3. So much of section 11 of Act No. 388, Local Acts of 1889, as confers upon the commissioners of parks and boulevards the authority to make all suitable and needful rules and regulations respecting the use of Belle Isle bridge and its approaches by foot-passengers, etc., cannot be upheld, as it places in the hands of an administrative body legislative authority, which is vested by the charter in the common council of the city of Detroit. *Id.* (3).
4. The commissioners of parks and boulevards of the city of Detroit are the proper administrative body to have the custody and control of Belle Isle bridge, under the general

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BELLE ISLE BRIDGE—Continued.

direction of the common council of the city, as exercised through ordinances enacted for that purpose, and to that end may hire the necessary employés, who are subject to the supervision and control of said commissioners. *Id.* (4).

BILLS AND NOTES.

1. The payees in certain notes sold them to a bank, and became sureties for the maker by the manner of their indorsement. At the request of the maker, and by consent of the sureties, the notes were renewed, on which renewal notes suit was brought, and the sureties (indorsers) claimed that they were induced to consent to the extension by the fraudulent representations of the holder of the notes as to the solvency of the maker, and that their *second* indorsement was void; and it is held that, if the renewal notes were invalid, the original notes remained in full force, upon which the indorsers were liable, and that their defense, if sustained, only went to a recoupment, under proper pleadings, to the extent of the injury actually suffered by reason of extending the time for payment. 3 (*e*).

2. To hold that, when an indorser of a note applies to have it discounted for his own accommodation, the silence of the bank as to other indebtedness of the maker to the bank, and of his assurance that he will give security if required, is a fraud upon the indorser, enabling him to retain the consideration received for the note, and discharge him from liability as indorser, is a doctrine too palpably absurd for serious consideration. *Id.* (*h*).

3. Complainant indorsed three notes for defendants' traveling salesman, due in one, two, and three years respectively, given to secure an alleged shortage of $2,000 in his accounts, defendants threatening to discharge him unless such shortage was paid or secured. Defendants *verbally* agreed, in case complainant would indorse the notes, to retain the salesman in his position, and retain from his salary $60 per month during each month until the maturity of the notes. At the request of the salesman, who was fully advised of the foregoing facts, complainant indorsed the notes, which were delivered to the defendants, who executed and delivered to complainant an agreement to retain the $60 per month, and indorse it on the notes. The salesman was retained for

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BILLS AND NOTES—Continued.

about four months, and the agreed sum applied on the notes, when he was discharged *without sufficient cause*, of which fact complainant had no notice or knowledge until after the maturity of the first note, he having relied upon the representations and agreement of the defendants in the premises. He thereupon filed a bill, setting up the foregoing facts, in which he prayed that he might be released from his indorsements, and that the notes might be delivered up and canceled, so far as the same affected him, and for an injunction to restrain defendants from enforcing the indorsements, and from transferring the notes, which were negotiable. The defendants demurred generally, claiming that the notes and written agreement must be construed together, and that they formed a complete contract, and could not be changed by parol evidence of contemporaneous agreements, which contract could not be construed into a promise to retain the salesman in their employment until the notes were paid.

In overruling the demurrer, the Court held that the circumstances surrounding the making of the notes are to be applied in arriving at the intention of the parties in entering into the agreement, and that what is plainly implied from the language used in the written agreement is as much a part thereof as if expressed therein; and that, applying these rules, there is no difficulty in deciding that it was a part of the *written* agreement that the salesman should be retained in defendants' employment until the notes were paid, subject to the contingencies of his voluntary leaving, or of his discharge *for cause*, or incapacity to work, or his death, in which event complainant would be bound by his contract of indorsement, discharged of all conditions. 336 (1).

4. In such a case equity has jurisdiction to grant the relief prayed for, irrespective of the solvency or insolvency of the maker of the notes, and thus prevent complainant's being made liable upon his indorsements by the transfer of the paper to *bona fide* holders, and from being harassed by suits in which he could not interpose the defense set up in his bill. *Id.* (2).

5. The failure of the holder of township drain orders, on exchanging them with the township treasurer for a note held by him in his individual name (which note was taken by the treasurer on the sale of property for taxes, but of which fact

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BILLS AND NOTES—Continued.

the holder of the orders was ignorant), to make inquiry as to how the treasurer obtained the note, is no evidence of bad faith. 552 (2).

6. A promissory note in the usual form, with nothing written upon it indicating that it was taken in an illegal transaction, is "fair upon its face." *Id.* (3).
7. The consideration paid for a promissory note need not be in money, in order to have the note come to the purchaser in due course of business. *Id.* (4).

See EVIDENCE (3); FRAUD; TAXES (3).

BILL OF PARTICULARS.

Where, on the reversal of a judgment, the necessity of an amendment of plaintiff's bill of particulars was suggested, and, instead of making such amendment, an amended declaration was filed, which set forth plaintiff's claim with sufficient definiteness, there is no force in an objection that the bill of particulars was not amended. 489 (1).

BILL TO QUIET TITLE—See FRAUDULENT CONVEYANCES.

BOHEMIAN OAT NOTE CASES—See FRAUD.

BONA FIDE PURCHASER—See QUITCLAIM DEED.

BONDS.

1. The liability of sureties on an administrator's bond arises only after the default of their principal is fixed, and then only under the terms of the obligation entered into by them. 184.
2. The failure of the sureties upon a township drain commissioner's bond to justify, pursuant to Act No. 179, Laws of 1885, does not necessarily create a vacancy in the office, said bond having been approved and the proper oath of office having been filed. 265 (1).
3. The office of a township drain commissioner, who has exercised his duties for a year and a half without question, under the oath of office and bond filed by him, cannot be declared vacant by the township board on account of the failure of his sureties to justify, without notice to such officer, and an opportunity to file a new bond with the proper justification. *Id.* (2).

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BONDS—Continued.

4. The following propositions are summarized from the opinion of Mr. Justice MORSE:

a—Act No. 179, Laws of 1885, requiring sureties upon official bonds to justify, does not, in terms, make such justification a condition precedent to the entry of the principal upon the discharge of the duties of his office.

c—The courts generally hold that, even though the statute expressly provides that upon a failure to give a bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment, the default is a ground for forfeiture only, and not a forfeiture *ipso facto*, and that if, notwithstanding such default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title *de jure*, having relation back to the time of his election or appointment. *Id.* (3).

See LIQUOR TRAFFIC (6).

BOUNTIES—See WAR BOUNTIES.

BURDEN OF PROOF—See CHATTEL MORTGAGE (2).

BURGLARY—See CRIMINAL LAW (3).

CARRIERS—See COMMON CARRIERS.

CASES OVERRULED—See OVERRULED CASES.

CATTLE—See NEGLIGENCE (6).

CERTIORARI.

1. The practice adopted in this case, of bringing the proceedings to this Court by *certiorari*, was approved in *Kelly v. Reynolds*, 39 Mich. 464. 229 (3).

2. An affidavit which has been indorsed with an allowance of a writ of *certiorari*, and filed in the clerk's office, and the writ issued, cannot be used as the basis for the allowance of a second writ. 270 (1).

3. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—A justice of the peace is justified in refusing to make return to a writ of *certiorari*, if the bond is not served upon him within the statutory ten days.

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CERTIORARI—Continued.

b—The statutory writ of *certiorari* is special, and the proceedings to obtain a review by this process must be strictly complied with.

c—A party has no right to take from the files of the clerk's office an affidavit upon which a writ of *certiorari* has been issued, to present it for a second order of allowance, the statute contemplating that the affidavit shall be presented to the judge or commissioner *before* it is filed in said office. 271 (2).

See JUSTICES' COURTS (2).

CHARGES—See COUNTY OFFICERS.

CHARGE TO JURY.

1. It is error for the court in a negligence case to refuse to instruct the jury that, if plaintiff's own negligence caused or contributed to the injury, he cannot recover. 56 (2).
2. The omission of the trial judge to charge the jury upon a point to which his attention is not called cannot be assigned as error in a civil suit. 350 (4).
3. Act No. 101, Laws of 1885, authorizing the assignment of errors on the charge of the court without exceptions to support them, does not cover an omission or refusal to charge. *Id.* (5).
4. The charge in this case, when construed as a whole, is held to fairly submit the question of plaintiff's alleged hiring, and the date thereof, to the jury. 423 (2).

CHATTEL MORTGAGE.

1. *Prior* mortgagees of a *portion* of the property covered by another chattel mortgage, duly filed, seized the *entire* property, which they refused to surrender to the other mortgagee, who brought trover for its value. Before the trial the mortgagor paid the plaintiff's claim, and the defendants thereupon interposed a plea setting up such payment, but did not pay or tender the costs of suit; and it is held that, to render their plea effective, such payment or tender should have been made, and a judgment for six cents damages and costs of suit in favor of the plaintiff is affirmed. 293.
2. Plaintiff, as mortgagee of one Need, replevied a span of horses which he had taken possession of under his mortgage,

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CHATTEL MORTGAGE—Continued.

and which the defendant (for Ware & Olin) rescued by force, claiming ownership of the property; Ware having furnished the team to Need under a logging contract, but retaining the title until the horses were paid for. The team was furnished to be used on a logging job, and not elsewhere, at the *completion of which* it rested with Need to say whether he would keep and pay for the team or not, and if so he had the right to apply in payment any balance *then* due him on the contract. Need did not perform the contract, and, as Ware & Olin claimed, abandoned it, and they took possession, and completed the job, but Need claimed that such action on their part was wrongful. In reversing the action of the trial court in directing a verdict in favor of the defendant Olin, it is held that the issue *thus* raised was the material question in the case, and, if found in favor of Need, the state of his account with Ware & Olin became important to be shown, and the burden of proof was upon plaintiff to show payment, and any testimony having a tendency to prove that fact was admissible. 296 (2).

8. Where a bill of sale (intended as security) is given for a specified consideration, and nothing appears upon its face to indicate that it is intended to secure any other or greater sum, the creditors of the mortgagor (vendor) are entitled to treat it as valid only to the amount specified. 475 (1).

4. An assertion of a mortgage lien, after the payment of the mortgage debt, is a fraud upon the creditors of the mortgagor, who may levy upon the property, and the mortgagees cannot maintain replevin against the officer. *Id.* (2).

See CRIMINAL LAW (7, 10); EVIDENCE (12, 13).

COLOR OF TITLE—See TRESPASS (3).

COMMERCIAL AGENCY—See EVIDENCE (17).

COMMISSIONERS OF PARKS AND BOULEVARDS OF DETROIT —See BELLE ISLE BRIDGE.

COMMON CARRIERS.

1. Acquiescence by consignees for a number of years in the delivery of freight by a common carrier to *independent* warehousemen, from whom they received it, as also notice of its

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COMMON CARRIERS—Continued.

arrival, and to whom they gave the necessary receipts, will relieve the carrier from liability for its safe-keeping upon its delivery to such warehousemen. 90 (1).

2. The following general propositions are summarized from the opinion of Mr. Justice LONG:

a—At common law, a common carrier is responsible on implied contract for all loss of, or injury to, goods received for carriage, unless caused by the act of God or the public enemy or the fault of the owner.

b—A common carrier may limit his liability for loss to his own line; citing *Railroad Co. v. Bank*, 20 Wis. 122; *Irwin v. Railroad Co.*, 59 N. Y. 653; or he may by special contract extend such liability so as to cover a *safe* delivery at the place of destination; citing *Railroad Co. v. Pratt*, 22 Wall. 124; *Noyes v. Railroad Co.*, 27 Vt. 110.

c—In Michigan, in the absence of an express contract, or one fairly inferable from the nature of the business, the known necessities under which it is carried on, and the established usage on the subject, a common carrier cannot relieve itself from responsibility *as such* by depositing the goods in its warehouse at the end of its route; citing *Buckley v. Railway Co.*, 18 Mich. 121; *Feige v. Railroad Co.*, 62 Id. 1.

d—U. S. Rev. Stat. § 4282, exempting vessel-owners from liability by reason of loss of or damage to goods by any fire happening to or on board of the vessel, is limited in its application to fires happening on ship-board.

e—As a general rule, by usage and common custom, railroad carriers may deliver freight at their depots, freight-houses, or stations, and be relieved of the burden of actual delivery at the place of business of the consignee, and of their common-law liabilities as common carriers, by notice to the consignee, and reasonable time thereafter to remove it. Persons delivering them goods to carry are supposed, in the absence of special contract, to understand such usage or custom, and to contract with reference to it. *Id.* (2).

COMMON-LAW ASSIGNMENT—See ASSIGNMENT FOR BENEFIT OF CREDITORS.

COMPLAINT AND EXAMINATION OF WITNESSES—See CRIMINAL LAW (14–17).

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COMPROMISE—See SETTLEMENT.

CONTRACTOR—See ACTION.

CONDEMNATION PROCEEDINGS—See EQUITY PRACTICE; STREET-OPENING CASE.

CONSTITUTIONAL LAW.

1. It is clearly within the power of the Legislature to provide that street railway corporations shall pay to owners of abutting property, in front of which they construct their roads, the damages caused by such construction. 77 (2).
2. Art. 18, § 2, of the Constitution, provides for a jury of twelve freeholders where private property is taken for the use of the public, and a provision of a city charter that the jury, in such a case, shall be composed of twelve inhabitants of the city, qualified to serve as jurors in courts of record, is repugnant to such constitutional provision, such jurors not being required to be freeholders. 328 (1).
3. Act No. 213, Laws of 1889, known as the "New Liquor Tax Law," as approved by the Governor, and published, was never passed by the Legislature, as shown by an examination of the legislative journals, and is null and void, leaving the liquor law of 1887 in force. 598 (1).
4. The courts will take cognizance of the journals of the Legislature, and look into them, for the purpose of determining whether the methods of the Constitution have been followed in the passage of laws; it being considered that the safety and permanency of our institutions will be best promoted by so doing. *Id.* (2).
5. How. Stat. § 9180, providing a distinct punishment for horse-stealing, is constitutional, and does not supersede the general statute against larceny. 634 (1).

See BELLE ISLE BRIDGE (3); STREET-OPENING CASE (1, 2); STREET RAILWAYS.

CONSTRUCTION OF CONTRACT.

Courts must interpret and give effect to contracts according to the clear intent of the parties as expressed in the writings they have deliberately executed. 116 (4 *a*).

CONTRACT.

1. Where, after one year's operations under a logging contract,

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CONTRACT—Continued.

the contractors are notified by the land-owners not to cut any more timber, and are refused the supplies agreed to be advanced to enable them to perform the contract, they have the right to seek other employment upon the strength of such notice and refusal, which they cannot be forced to abandon by a subsequent notice from the land-owners to proceed at once and perform the *first* contract. 448 (1).

2. Where, in such a case, the land-owners proceed to cut a portion of the timber themselves, and let the contract to a third party to remove the remainder, the contractors are fully justified in treating the contract as broken by the land-owners, and may recover damages for its breach the same as if no notice to proceed had been served upon them. *Id.* (2).

3. A logging contractor having failed in the *full* performance of his contract, by mutual agreement all claim for damages was waived, and the time of performance extended into another winter, the land-owners reserving the right to fix the time of removal of the timber on *one* of the sections designated in the contract. After this, and before the contractor had commenced work under the new agreement, third persons were induced to take it off his hands, and he was released upon their agreement to perform his agreements, which action is held to amount to a new contract with them, based upon the terms of the old contracts, and for which there was a sufficient consideration. 457.

See CONSTRUCTION OF CONTRACT; WAGES.

CONTRACT OF INDORSEMENT—See BILLS AND NOTES (4, 5).

CONTRACT TO AID IN ERECTING A HOTEL—See MORTGAGE (3).

CORPORATIONS.

1. Stock issued by an association organized under How. Stat. chapter 188, for "yachting, hunting, fishing, boating, rowing, and other lawful sporting purposes," is *not* subject to levy and sale on execution under How. Stat. § 7697, authorizing the sale on execution of the share or interest of a stockholder in any bank, insurance company, or any other *joint-stock company*, incorporated under the laws of this State. 371.

2 A corporation cannot be held to have contracted unless its

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CORPORATIONS—Continued.

officers or agents who make such contract have express or implied authority to bind the corporation, and even individual directors have no power to bind the corporation. 491 (1).

See GARNISHMENT; MINING CORPORATIONS.

COSTS.

1. Vendors, on rescinding a sale, brought replevin, and in the affidavit, writ, and declaration alleged the value of the goods to be $115.50, being the price agreed to be paid by the vendee. Goods appraised at $64.70 were seized on the writ, and the only evidence of the value of the goods not found was the aforesaid agreement. Judgment passed for the plaintiffs on the main issue, and it is held that they were entitled to costs under How. Stat. § 8964 (subd. 4), which gives a plaintiff in replevin costs if the circuit court has exclusive or concurrent jurisdiction. 382 (3).
2. Where a bill is filed against the executrix of a mortgagee to compel the discharge of an outlawed mortgage, and the defense is based *wholly* upon the claim that the defendant did not feel authorized to discharge the mortgage as such executrix, the court may very properly require the complainant to prosecute the suit at her own expense, under How. Stat. § 8963. 427 (2).

See CHATTEL MORTGAGE (1).

COUNTY OFFICERS.

1. The authority of the Legislature to confer upon the Governor the power of removal of county officers was sustained in *Clay v. Stuart*, 74 Mich. 411. 187 (1).
2. The Governor has no power to order an investigation except upon *specific* charges; nor can he remove an officer, after such investigation, unless upon such a showing and record of the proceedings as will show to the world and to the accused for what particular act or acts of misconduct he has forfeited his office, and been removed therefrom. *Id.* (2).
3. A charge that such an officer is "an habitual drunkard" is as explicit as it well could be. *Id.* (3).
4. Charges that respondent is—

a—Wholly incompetent to execute properly the duties of the office, and—

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COUNTY OFFICERS—Continued.

b—That he is guilty of official misconduct,—

Are mere conclusions of fact, and fall under the condemnation of *Dullam v. Willson*, 53 Mich. 393. *Id.* (4).

5. A charge that the respondent "arrested innocent people without process, and after confining them a short time, without arraignment, allows them to go free," and that he "assaults peaceful citizens, and in one instance inflicted serious injury, dislocating a shoulder," is altogether too general to meet the requirements of justice or the statute. How. Stat. § 653. *Id.* (5).
6. Where the charges presented to the Governor are not sufficiently specific, the defect is not cured by the service of a bill of particulars five days before the hearing, containing the necessary specifications, the respondent being entitled to a notice of eight days, accompanied by a copy of such charges. How. Stat. § 654. *Id.* (6).
7. The Governor cannot, by any act of his own, enlarge the power granted him by the Legislature; nor can the Legislature, by any act, deprive a person of a right to hold an office to which he has been elected or appointed, and whose duties he has assumed, except by due process of law. 188 (7).

CRIMINAL LAW.

1. The agreement of the Attorney General, or prosecuting attorney of the proper county, for the continuance of the hearing of a criminal case in the Supreme Court, is binding upon both of said officers. 501 (1).
2. Act No. 72, Laws of 1887, which makes it the duty of the prosecuting attorney to appear in the Supreme Court in criminal cases removed from his county, is construed as requiring him to furnish a brief and make the main argument, but the management of the case remains under the control of the Attorney General. *Id.* (2).
3. An acquittal under an information charging the respondent with burglary, with *intent* to commit the crime of larceny, is not a bar to a subsequent prosecution for the same larceny, charged to have been *actually* committed. 567.
4. An information for incest, which charges the respondent, a married man, with having had sexual intercourse with his daughter, need not allege that he committed the crime of adultery; nor is it defective because he is charged with hav-

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CRIMINAL LAW—Continued.
ing committed the crime of fornication in so doing. 576 (1).
5. Evidence of prior acts of sexual intercourse between a father and his daughter is admissible on his trial for the crime of incest committed at a later date. *Id.* (2).
6. A prosecuting attorney, who is the attorney for the plaintiff in a pending replevin suit, is disqualified, under Act No. 82, Laws of 1883 (amendatory of How. Stat. § 557), from prosecuting the defendant in replevin for larceny alleged to have been committed in recapturing the property replevied, the title of the plaintiff in replevin, and the state of facts under which he claims to maintain his title to the property, being the same as those upon which the charge of larceny is predicated. 580 (1).
7. Where a respondent, charged with the larceny of property on which he held a chattel mortgage, claims to have taken it on the mortgage, it is error to permit the prosecution to prove by an attorney what advice he gave the respondent as to his *right* to so take the property. *Id.* (2).
8. It is error to permit the people to prove the principal case under the head of rebutting evidence. *Id.* (3).
9. Where a respondent on his cross-examination is questioned concerning irrelevant matter, the people are bound by his answers. *Id.* (4).
10. The recapture by a mortgagee of the mortgaged property, which an adverse claimant had replevied from him, is not *of itself* larceny; and if the jury find, by a fair preponderance of evidence, that the mortgagee found the horse running at large in the highway, and supposed that the plaintiff in the replevin suit had allowed him to so run at large, and so given up possession of the animal, they cannot convict. *Id.* (5).
11. In *all* cases where one in *good faith* takes another's property under a claim of right so to do, or of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim in fact be, and the question of the *bona fides* of the respondent is for the jury. *Id.* (6).
12. Where all of the facts essential to a conviction are admitted, there is nothing for a jury to pass upon, and it is not error for the court to direct a verdict of guilty. 588 (4).
13. On the trial of a respondent for murder, the prosecuting attorney, at the close of the testimony, stated to the court

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CRIMINAL LAW—Continued.

that the people would only claim a conviction for manslaughter, and the counsel who was assisting him on the trial, after referring to such fact, stated in his argument to the jury that if he believed the respondent not guilty of manslaughter, or if he had a reasonable doubt of his guilt, he would not ask the jury to convict him; to which remarks exception was taken, but no instruction requested concerning the same. And it is held, after reviewing former decisions on this subject, that the expressions used by the counsel were moderate, and explanatory of the action of the prosecutor in not asking for a verdict of murder, and why he should urge a conviction of manslaughter, and that, if respondent's counsel anticipated that the remarks might have a prejudicial effect upon the jury, he ought in fairness to have called the attention of the court to the language used, and requested a charge to remove such effect. 616.

14. The complaint and examination of witnesses required by the statute in cases not cognizable by a justice of the peace need not be reduced to writing. 623 (1).

15. The Court will presume that the justice examined the complainant and his witnesses orally where such fact is recited in the warrant purporting to have been issued upon such complaint and examination. *Id.* (2.)

16. The fact that an affidavit was taken by a justice of the peace in support of a complaint for an offense beyond his jurisdiction to try, prior to reducing such complaint to writing, does not affect his jurisdiction to issue a warrant. *Id.* (3).

17. The object of the examination of the complainant and his witnesses in a case not triable by a justice of the peace is to enable that officer to determine from it whether there is sufficient ground for issuing a warrant. *Id.* (4).

18. Where there are two counts in an information charging different grades of the same offense, upon a conviction or plea of guilty, it has been the general practice in England and in this country to pass judgment according to the count charging the highest grade of the offense. 634 (2).

19. It must be presumed, in support of a judgment upon a plea of guilty, that the respondent understood the information read to him, and that the judge, as required by law, correctly explained the charge against him before passing

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CRIMINAL LAW—Continued.

sentence, and that he therefore pleaded guilty to *all* that the information contained. *Id.* (3).

20. How. Stat. § 9252, does not attempt to punish any person for falsely assuming to be a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, but for falsely assuming *to be*, and taking upon himself to *act as*, such officer. 646.

See POLICE COURT OF GRAND RAPIDS.

CUSTOM.

Before any custom can be admitted into the law, it must appear that the usage has been general and uniform, the custom peaceably acquiesced in, and not subject to contention and dispute, and it must be certain. 91 (*f*).

DAMAGES.

1. Where the evidence in a suit for assault and battery and malicious prosecution showed that the defendant assaulted the plaintiff, who was a carpenter by trade, with an axe, and broke his wrist, and that he was laid up for three months, for which the jury awarded him $100, and that plaintiff lay in jail 10 days under the charge of the defendant, which the jury found was malicious, for which they awarded him $70, such amounts, though large, cannot be said to have been awarded *entirely* without evidence. 350 (6).

2. In a suit for the breach of a logging contract by being prevented from cutting and removing the timber, the difference between the cost of such cutting and removal and the contract price is held, under the testimony in this case, to be a proper measure of damages. 448 (3).

3. Plaintiffs sold a boiler and certain machinery, and retained the title until the property was paid for. The vendee, with their consent, removed the property to another county, where he attached it to other machinery in such a way that there was nothing to designate it therefrom, and operated the *whole* in his business. An officer levied upon the *whole* property as that of the vendee, but did not remove it; and it is held that he could not be made liable in damages until after his refusal to deliver to the vendors their portion of the property upon due demand and identification. 651.

See ACTION; CONTRACT (2); CONSTITUTIONAL LAW (1); EQUITY

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DAMAGES—Continued.

PRACTICE; ERROR WITHOUT PREJUDICE; EVIDENCE (6); FIRE INSURANCE (1-3).

DEED—See MISTAKE; QUITCLAIM DEED.

DEFINITIONS.

1. Occupancy. 249 (1).
2. Half. 491 (2).
3. All legal holidays. 588 (1).

DESCRIPTION OF LAND—See HALF

DESERTION—See DIVORCE.

DIRECTING VERDICT OF GUILTY—See CRIMINAL LAW (1, 2).

DIVERSION OF WATER—See WATERS AND WATER-COURSES.

DIVORCE.

Where, after living peaceably with her husband for 35 years, a wife left her home and went to California to see a married daughter, from whom she had been separated for some years, after which no correspondence passed between the husband and wife, and he, while professing a desire to keep his family together, made no effort to induce his wife to return, his bill for divorce on the ground of desertion is properly dismissed. 572.

DRAIN LAW OF 1885.

In construing Act No. 227, Laws of 1885 (drain law), the following points are decided:

a—The primary petition for the construction of the drain need not state that it is necessary for the public health or highways; citing chap. 3, § 1; *Gillett v. McLaughlin*, 69 Mich. 547.

b—The application to the probate court is not required to be verified; citing chap. 3, § 5.

c—An application referring to the "annexed original determination of the drain commissioner," which contains a description of the land traversed by the drain, and of the drain, is sufficient.

d—The petition for the establishment of the drain need not contain an accurate description of *termini* and route for the

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DRAIN LAW OF 1885—Continued.

proposed drain; citing chap. 3, § 3; *Kinnie v. Bare*, 68 Mich. 625.

e—Mortgagees do not come within the description of persons entitled to notice of hearing; citing chap. 3, §§ 6, 7.

f—The statute does not require the *hearing* of the application to be had within 40 days from its filing with the probate court, the court having power to adjourn the same; citing chap. 3, §§ 6, 8; and an announcement of such an adjournment made in open court is a sufficient notice to all parties who have been served with citation, whether present or not. 345.

DRAINS—See TAXES (2); WATERS AND WATER-COURSES.

DRUGGIST—See LIQUOR TRAFFIC (1).

EQUITABLE LIEN—See MORTGAGE (8).

EQUITIES OF JUDGMENT DEBTOR—See FRAUDULENT CONVEYANCES.

EQUITY.

Equity will compel the discharge from record of an outlawed mortgage without requiring proof of the actual payment of the mortgage debt. 427 (1).

EQUITY JURISDICTION.

A demand for the examination of witnesses in open court does not deprive the court of the right to direct an accounting before a commissioner in a proper case. 532 (3).

See BILLS AND NOTES (4).

EQUITY PRACTICE.

The owners of separate lots abutting on a street may join in a bill to restrain the construction of a street railway therein without complying with a statute requiring the payment to such owners of the damages thereby sustained, which damages are not recoverable in such suit, but in the condemnation proceedings provided for by the statute. 77 (1).

ERROR WITHOUT PREJUDICE.

In this case it is held that while the court should have limited the plaintiff's recovery to the actual *cash* value of the prop-

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ERROR WITHOUT PREJUDICE—Continued.

erty, that being the limit of the liability of the company under its charter, the omission was error without prejudice, inasmuch as the jury, in answer to special questions, fixed the value of the property at such a sum as prevented them from finding a verdict for *less* than the insurance and interest. 408 (4).

ESTATES OF DECEASED PERSONS.

An appeal properly claimed, perfected, and allowed in the probate court ought not to be dismissed for a failure to file the record in the circuit court within the thirty days limited by Act No. 175, Laws of 1887, if such record is filed before the motion to dismiss is actually heard. 511.

See BONDS (1); EVIDENCE (11, 22); WILL.

ESTOPPEL—See FIRE INSURANCE (4); WAIVER.

EVIDENCE.

1. It is not sufficient to show the making of representations alleged to be false, but their falsity must be proved in order to charge the maker with actionable fraud. 3 (*c*).
2. The practice is settled in this State, as at common law, that it is not competent to prove distinct facts in defense that have not been made part of the issue as framed. *Id.* (*d*).
3. Where, in a suit against indorsers, their defense is nonliability because of fraud practiced in securing their indorsement, testimony which recognizes such liability, and seeks to establish a discharge by matters *ex post facto*, is inadmissible. *Id.* (*f*).
4. In a suit involving, as an issue, the consent of a land-owner to the diversion of water upon his lands, he may show all things done by him, or by others in his behalf, by way of protest or remonstrance against such diversion. 101 (5).
5. It is not competent, in a negligence case, to prove what expressions of pain were made by the plaintiff more than four years after the accident, and after the suit was commenced, and when it was expected to come on for trial. 154 (2).
6. Testimony which enables a jury to fix the daily capacity of a saw-mill, or the number of days required to perform a

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EVIDENCE—Continued.

sawing contract, and the daily expenses incurred in operating the mill while engaged in such performance, affords them sufficient *data* from which to ascertain the difference between the cost of performance and the contract price, without entering the field of conjecture or speculation. 163 (2).

7. A witness who is asked to state to the jury the *extent* of the sufferings of the plaintiff in a negligence case, based upon his observation, cannot testify to what the plaintiff said to him about her sleeplessness at night, in response to his inquiries made the next morning; the same being hearsay testimony. 237 (1).

8. A question calling for the *opinion* of a witness whether an accident happened by reason of the defendant's negligence or of the plaintiff's inattention calls for incompetent testimony. *Id.* (2).

9. It is unfair to establish one rule for the plaintiff and another for the defendant in the admission or exclusion of testimony. *Id.* (3).

10. A complainant, who claims that a mortgage sale by advertisement is void because separate lots were sold in one parcel, has the burden of proof to show that they were *not* occupied as one parcel; and it is not sufficient to show that part of one lot was fenced and cultivated, and that the adjoining lot was unfenced. 249 (2).

11. A son and daughter offered for probate two instruments, in form warranty deeds, purporting to convey to each a portion of the father's real estate. In order to establish the testamentary character of the instruments, they were permitted to testify that the deceased retained the papers in his possession, and on the day of their execution informed them that he should retain such possession, as also the control of his property, while he lived. This testimony was objected to by the contestant, a brother of the proponents, as incompetent under How. Stat. § 7545, the facts stated being equally within the knowledge of the deceased; and it is held that said statute has no application to such a case; citing *Brown v. Bell*, 58 Mich. 58; *Scofield v. Walker*, Id. 96. 285 (2).

12. The production of the record-book of chattel mortgages from the proper office, upon which is found the entry of the filing of a chattel mortgage, as of a given date, in its regular order, accompanied by the testimony of the clerk that

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EVIDENCE—Continued.

the mortgage was among the files of chattel mortgages in his office until about the time of the trial, when it was delivered to the attorney of the party producing it, is sufficient evidence of the making of such entry and of the filing of the mortgage at the date named. 324 (1).

13. In a suit between the holder of a chattel mortgage and an attaching creditor of the mortgagor, who attacks the mortgage as fraudulent as to creditors, testimony tending to prove that the mortgagor entered into a fraudulent arrangement with certain *other* creditors, with respect to *other* personal property, is properly excluded. *Id.* (2).

14. In an action for malicious prosecution the plaintiff offered to show the circumstances of a difficulty that occurred between the parties three years before the trial, and the court excluded all evidence upon the subject, except of certain threats made by the defendant against the plaintiff, and the ruling is sustained under *Dillon v. People*, 8 Mich. 366; *Wellar v. People*, 30 Id. 22; *Patterson v. Garlock*, 39 Id. 449. 350 (1).

15. The tax roll returned to the county treasurer is not admissible in evidence to show that the supervisor's certificate of assessment is defective, such certificate being no part of such tax roll, and not required to be copied therein. 359 (4).

16. A justice's judgment was sued over in the circuit court. Upon offering in evidence the docket entries and files, it appeared that the summons was served by a private person. No indorsement authorizing such service was upon the summons, nor did the docket show that any inquiry had been made by the justice as to the competency of the appointee. The circuit court permitted the justice of the peace who rendered the judgment to supply these omissions by his oral testimony, and to make the necessary indorsement upon the docket. And it is held that such action cannot be defended upon authority or reason. 367 (1).

17. A reporter for a commercial agency, having testified to procuring a statement of the financial standing of a merchant, which he reduced to writing, and a copy of which he had in his possession, was asked to refresh his recollection from the copy, and after stating that he could not remember the figures, but could state what the statement was by reading it, was permitted to read from the copy to the jury; and it

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EVIDENCE—Continued.

is held that the testimony was incompetent, the effect being the same as if the copy had been introduced in evidence. 882 (1).

18. Where a railway company has permitted an unsafe and dangerous means to be provided and used to enable the public to reach its station, the length of time and extent of such use may be shown by the plaintiff in a negligence case brought to recover for injuries received by reason of attempting to use such means of approach. 390 (2).

19. In a civil suit for assault and battery, the defendant testified that the plaintiff attacked him with a knife, which he did not identify, but called a witness who was present, who, after testifying that he did not see the knife at the time, but that a few days afterwards he was shown a knife which the defendant claimed was the one used by the plaintiff, was asked "what kind of a knife it was," and the answer is held properly excluded. 443 (2).

20. Where justification, by way of self-defense, is pleaded in a civil suit for assault and battery, it is competent to show the character of the opposite party as being quarrelsome or otherwise, when such fact has been brought to the knowledge of the defendant prior to the assault complained of; citing *Galbraith v. Fleming*, 60 Mich. 403; but the testimony of a third person to a knowledge of such fact, unless communicated to the defendant before the affray, is irrelevant. *Id.* (3).

21. Evidence of what it is worth to perform certain labor is inadmissible where both parties claim that it was performed under a parol contract, and only differ as to the contract price. 448 (4).

22. The testimony of a daughter of a claimant against the estate of a deceased person, as to admissions made by the deceased, is not incompetent under How. Stat. § 7545, prohibiting the opposite party from testifying to matters which, if true, must have been equally within the knowledge of the deceased. 472 (3).

23. Parties relying upon parol evidence to establish the contents of a written agreement claimed to be lost should be required to explain fully the circumstances of the loss or destruction of the paper, so as to relieve themselves from any reasonable suspicion of having connived at its loss, and to show its con-

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EVIDENCE—Continued.

tents by proof that satisfies the mind as to its terms. 531 (1).

24. The declaration in a negligence case alleged that the sidewalk in front of certain premises, and upon which plaintiff fell and was injured, was out of repair; that the stringers were rotten; the planks loose; and the walk in an unsafe and dangerous condition. The exact place where plaintiff fell was not pointed out. The plaintiff's evidence fully supported these allegations, and showed that the defects had existed for a year and upwards. And it is held that the evidence was competent as tending to show notice to the defendant of the condition of the walk, and its negligence in allowing it to remain in such a condition. 655 (2).

See CHATTEL MORTGAGE (2); CRIMINAL LAW (5, 7, 8, 12); EQUITY JURISDICTION; LIQUOR TRAFFIC (4); NEGLIGENCE (7, 8, 9); REPLEVIN (2).

EXAMINATION OF WITNESSES IN OPEN COURT—See EQUITY JURISDICTION.

EXECUTION—See CORPORATIONS (1).

EXECUTION LIEN—See FRAUDULENT CONVEYANCES.

EXECUTORS AND ADMINISTRATORS—See BONDS (1); COSTS (2).

FELLOW-SERVANTS.

A foreman intrusted with the general supervision of a coal and freight business, including the unloading of vessels laden with coal, and the employment and direction of men for that purpose, is not a fellow-servant with them, and the master is responsible for his negligence in performing such delegated duties. 56 (1).

FIRE INSURANCE.

1. An insurance policy covering a stock of lumber contained an agreement to submit the amount of "loss or damage," in case of fire, to arbitration (the arbitrators not being named), payable only when so ascertained, which arbitration was made a condition precedent to bringing suit; and it is held that the agreement was reasonable and legal, and enforcible whether the loss was *total* or *partial*. 116 (1).

2. An insurance policy on a stock of lumber contained an agreement for arbitration as to the *amount* of loss, which

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FIRE INSURANCE—Continued.
was limited to the actual cost of producing the lumber destroyed. On receiving proofs of loss the company promptly informed the assured by letter that it disputed the *amount* of loss claimed in the proofs, and insisted that it be estimated under the contract, whereupon the assured at once brought suit; and it is held that the letter, if not a demand for, was not a waiver of, arbitration. *Id.* (2).

3. An insurance policy provided that in the event of loss the measure of damages should in no case exceed the actual cost of producing the lumber destroyed, which provision is construed as follows:

a—If the assured bought the *logs*, he can recover the price paid, with interest from date of purchase, and the cost of manufacturing and storing.

b—If he purchased the *stumpage*, such recovery is limited to the price paid, with like interest, and the other costs added.

c—If he owned the lands from which the logs were cut, he can recover the fair value of the stumpage, with the other costs added, and interest. *Id.* (3).

4. Whether How. Stat. § 4247, which limits insurance by mutual fire insurance companies to buildings that constitute detached risks in villages and cities, refers to *incorporated* or *platted* villages, is not decided, the Court not being *inclined* to so limit it; but the question is held unimportant where the application located the building in the "*town* of Sumpter, south side of Main street," and the word "village" was substituted in the policy, issued at the home office, such act estopping the company from denying that the *place described* is a village because neither platted nor incorporated as such. 407 (1).

5. It seems to be settled by the weight of authority that there is no distinction between mutual and stock fire insurance companies as to their responsibility for the acts of their agents in taking applications for insurance. *Id.* (2).

6. A policy-holder in a mutual fire insurance company does not become a member until he receives his policy; and if there is no limitation of the agent's authority brought home to the assured, he must be considered the agent of the company in receiving the application, and his acts and knowl-

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FIRE INSURANCE—Continued.
edge are the acts and knowledge of the company. *Id.* (3).

FORECLOSURE BY ADVERTISEMENT—See EVIDENCE (10).

FORECLOSURE SALE—See MORTGAGE (1, 2).

FOREIGN CORPORATIONS—See GARNISHMENT.

FOREIGN WILL—See WILL.

FRAUD.

1. It must not be considered that the remarks of this Court in *Davis v. Seeley*, 71 Mich. 213, in which the Bohemian oat note scheme is declared to be "a transparent fraud," were intended to cut off *all* men from relief as against the chief swindlers in those transactions. The law takes note of the ignorant, the credulous, and the unwary, and will make their ignorance and want of cunning their innocence, and protect them. 317 (2).
2. An innocent party, who is defrauded into giving his promissory notes, is not obliged, upon information received from the party who defrauded him, or upon any other information short of a certainty, to contest the validity of the notes in the hands of a purchaser who was a stranger to the original transaction, and who is presumably an innocent holder of the paper. 396 (1).
3. An instruction to the jury in a suit to recover money paid to an alleged innocent purchaser of Bohemian oat notes, on the ground of the fraud of the defendant in securing the notes, from which the jury may infer that the payor had a right to rely upon the statements of the defendant, independent of his own knowledge and belief, and that, not being equally in fault, he might recover back the money so paid, although he knew at the time he gave the notes that the whole scheme was a fraud, and that, if he won, it must be that some one else would lose by a like transaction, out of which he must obtain his profit, is not good law. *Id.* (2).

See SETTLEMENT.

FRAUD IN SECURING INDORSEMENT—See BILLS AND NOTES.

FRAUDULENT CONVEYANCES.

Complainants took an assignment of a land contract as security

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FRAUDULENT CONVEYANCES—Continued.

for a loan, and at the request of the debtor, who was unable to meet his debt or the last payment on the contract, made such payment, and took a deed in their own names, and then contracted the land to the debtor's wife for the amount of their claims against the husband. During the life of the latter contract, the land was attached by a creditor of the husband, and afterwards levied upon, and notice of such levy filed, but no further steps were taken thereunder. Over two years after such attachment levy, complainants, with the consent of the wife, contracted the land to another party. The judgment creditor refused to release his levy, claiming that the husband had an attachable interest in the land, and that his surrender of his contract to complainants, and the execution of a new contract to his wife, was a mere device to defraud such creditor; whereupon complainants filed a bill to remove the cloud upon their title, which one of them testified was held as security for the debt due from the wife, to whom the surplus arising on the *last* sale was to be turned over. The vendee in the *last* contract was in possession, but without any stipulation in the contract therefor. In decreeing the relief prayed for, the Court hold—

a—That the right to enforce the lien, if it ever existed, has been lost by the failure of the judgment creditor to institute proceedings within one year to ascertain and determine the rights and equities of the judgment debtor; citing How. Stat. § 6108; *Grover v. Fox*, 36 Mich. 453; *Messmore v. Huggard*, 46 Id. 558; *Cranson v. Smith*, 47 Id. 189, 647.

b—The complainants were in a situation, in regard to the legal title and the possession, to maintain their bill. 146, 147.

FREE TEXT-BOOKS—See SCHOOLS AND SCHOOL-DISTRICTS.

GARNISHMENT.

1. The mode of service of garnishee process upon foreign corporations is absolutely within the discretion of the Legislature; and their right to do business in this State is dependent upon a compliance with Act No. 266, Laws of 1889, which authorizes such service to be made upon any officer or agent of the corporation found within this State, whether here upon corporate business or not. 242 (1).
2. A disclosure made and filed by a recognized agent of a

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GARNISHMENT—Continued.
foreign corporation, after service of garnishee process under Act No. 266, Laws of 1889, admitting the liability of the principal, is binding upon the corporation. *Id.* (2).
3. The fact that a foreign corporation is exempt from process of garnishment under the laws of its home state will not exempt it from such process when doing business in this State. *Id.* (3).

GOOD FAITH—See SURETY.

HALF.
The word "half," when used in describing lands, should be construed as meaning half in *quantity*, unless the context or surrounding facts and circumstances show a contrary intention. 491 (2).

HIGHWAYS.
1. The power of a commissioner of highways to adjourn the hearing of an application to lay out a highway is limited to twenty days by How. Stat. § 1300, and a longer adjournment ousts him of jurisdiction. 247.
2. Where a land-owner appeared in answer to a notice by the highway commissioner of a meeting to determine the necessity for altering and widening a highway, and objected to the proceedings on the ground that the application and notice and proof of service were not present, and was informed by the commissioner that they were at his house, and that if desired he would procure them, and his attorney answered that it would not be necessary to do so,—said papers being recorded in the proper record-book, which was present, and said land-owner having seen and inspected the original papers,—their absence will not invalidate the proceedings thereafter taken. 280 (1).
3. A highway commissioner is not obliged to enter into expensive litigation to determine whether a land-owner has encroached upon a public highway, as opened and used for many years, and who denies its legal existence, but may take him at his word and condemn his land for highway purposes, and pay him damages and compensation therefor. *Id.* (2).
4. It may not be desirable that grass should grow and be harvested in the wrought portion of a country highway, but when the travel has been in a uniform and beaten track,

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HIGHWAYS—Continued.

leaving grass to grow and ripen undisturbed upon either side, no one but the abutting land-owner, who owns the fee, has the right to harvest it; and he can not only maintain trespass or trover against any person cutting and taking it away against his will, but he has the right to *protect it* against *wanton* or *malicious* damage or destruction, whether attempted under the guise of travel upon the highway or in some other way. 559.

See NEGLIGENCE (6).

HOLIDAYS—See LEGAL HOLIDAYS; LIQUOR TRAFFIC (2, 3).

HUSBAND AND WIFE—See MARRIED WOMAN.

INCEST—See CRIMINAL LAW (4, 5).

INDORSEMENT—See BILLS AND NOTES (1–4).

INSURANCE—See FIRE INSURANCE; LIFE INSURANCE.

INTEREST.

A verbal agreement for the reduction of the rate of interest stipulated for in a written instrument is invalid. 249 (3).

JOINT-STOCK COMPANY—See CORPORATIONS (1).

JUDICIAL NOTICE.

The courts will take judicial notice of proclamations by the Governor or President of the United States, setting apart days for feasting and prayer or thanksgiving. 588 (2).

JURY.

In a civil suit for assault and battery it became a disputed question of fact whether one of the injuries complained of was inflicted by the defendant, or resulted from the action of the plaintiff after the affray, and it is held error not to submit the question to the jury. 443 (4).

See CHARGE TO JURY.

JUSTICES' COURTS.

1. Justices' courts are courts of limited jurisdiction, having no stated terms; and when a case has been tried, and the record

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JUSTICES' COURTS—Continued.
thereof entered upon the justice's docket, his control over it has ended, except to issue execution. 367 (*c*).
2. A justice of the peace cannot supply a jurisdictional fact in his return to a writ of *certiorari* by certifying to its existence, and thus cure the error. *Id.* (*d*).
3. This Court has held that, after a justice of the peace has made his return as an examining magistrate, he cannot procure the signatures of the witnesses who had failed to sign their depositions; citing *People v. Chapman*, 62 Mich. 280. *Id.* (*e*).
4. A justice of the peace has no power to amend his judgment record by changing the Christian name of the defendant, although consented to by both parties. 368 (*f*).

JUSTICES' SUMMONS—See EVIDENCE (16).

JUSTIFICATION BY SURETIES ON OFFICIAL BONDS—See BONDS (2–4).

LANDLORD AND TENANT.
1. The lease in this case is construed as only giving the lessor the right of re-entry, and possession of the stock and farming tools and utensils rented with the farm, in case the lessee failed to work the farm in a good and workman-like manner, and not to authorize the seizure of the crops for such breach. 466.
2. A declaration which sets up the construction and continuance of a *nuisance* by the defendant upon his own land, which the plaintiff went into possession of as a tenant, to the injury of the plaintiff, the existence and cause of which were unknown to the plaintiff, but were known to, and concealed from the plaintiff by, the defendant, discloses a cause of action in tort, resting upon the duty of the defendant to disclose to the plaintiff defects in the (leased) premises amounting to nuisances, known to defendant and concealed from plaintiff, and which were calculated to impair, and which did impair, the health of the plaintiff. 525 (1).
3. The declaration in this case is held to disclose a cause of action which does not rest upon any covenant, expressed or implied, of the landlord to repair the premises, nor that they were habitable at the time the lease was made, nor necessarily upon the relation of landlord and tenant, although the

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LANDLORD AND TENANT—Continued.

lease is set up by way of inducement, to show the right of plaintiff to the possession of the premises,—but one based upon the maxim that every person must so use his own premises as not to injure others, either in person or property, rightfully in the vicinity. *Id.* (2).

LARCENY—See CRIMINAL LAW (3, 6, 7, 10, 11).

LEASE—See LANDLORD AND TENANT (1).

LEGAL HOLIDAYS.

The courts will take judicial notice of proclamations by the Governor or President of the United States, setting apart days for fasting and prayer or thanksgiving, and, as the same are published in the daily and weekly newspapers, it is not to be presumed that any citizen is ignorant of them; nor will liquor dealers, or other business men, be permitted to plead such ignorance as an excuse for a non-compliance with, or a violation of, the statutes relating to legal holidays. 588 (2).

LEGISLATIVE JOURNALS—See CONSTITUTIONAL LAW (3, 4).

LIEN—See LOG-LIEN LAW; MINING CORPORATIONS.

LIFE INSURANCE.

1. Act No. 187, Laws of 1887, revising the laws providing for the incorporation of co-operative and mutual benefit associations, only applies to corporations organized under it, and cannot be made to apply to insurance contracts made or attempted to be made prior to its enactment. 332 (1).
2. A contract of insurance upon a life in which the beneficiary has not an insurable interest is a wager upon the life of the assured, and void as against public policy. *Id.* (2).

LIQUOR TRAFFIC.

1. In a prosecution for engaging in the sale of liquors without having paid the tax required by Act No. 313, Laws of 1887, the information must show that the defendant is not a "druggist who sells liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with law," thus negativing the exception found in the third section of the act. 578.

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LIQUOR TRAFFIC—Continued.

2. The term "all legal holidays," as used in section 17 of the liquor law of 1887, includes *all* days set apart by the Governor or President of the United States as days for fasting and prayer, or of thanksgiving. 588 (1).
3. All persons engaged in the sale of liquor in an open saloon on a legal holiday are made principals by section 24 of the liquor law of 1887, and all may be punished for the violation of the statute if proceeded against and convicted. *Id.* (3).
4. The admission of a respondent on trial for failing to keep his saloon closed on Sunday, that he was the keeper of a liquor saloon located in a front room on the first floor of a designated building, is not *prima facie* evidence that he was the keeper of a like saloon located in a rear room in the second story of the same building, and only connected with the other saloon by an outside stairway from an alley at the side of the building. 592.
5. An agent of a firm engaged in the sale of liquors cannot carry on such business at a place separate from, and not connected with, the saloon occupied by his principals, under the tax paid by them. 643.
6. The specified causes for which new bonds might be required of liquor dealers by county treasurers, namely, "the death, insolvency, or removal of either of the sureties," were not illegally laid down in the liquor tax law of 1887, but no method was provided of getting at the facts by a hearing before any one; which defect would have been cured by Act No. 213, Laws of 1889, if it had become a law. 648.

See CONSTITUTIONAL LAW (3); POLICE COURT OF GRAND RAPIDS.

LOG-LIEN LAW.

1. The language of section 1, Act No. 229, Laws of 1887, giving any person who performs any labor or services in manufacturing lumber a lien thereon for the amount due for such labor or services, is free from ambiguity, and gives such lien to the owner of a saw-mill who manufactures lumber under a sawing contract; and the fact that such mill-owner has a lien at common law is of no consequence in the face of this provision. 254 (1).
2. The common-law lien of the mill-owner upon lumber manufactured under a sawing contract is waived by the com-

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LOG-LIEN LAW—Continued.

mencement of an attachment suit to enforce the statutory lien given him by Act No. 229, Laws of 1887. *Id.* (2).

3. *Kieldsen v. Wilson*, 77 Mich. 45, in so far as it holds that Act No. 229, Laws of 1887, does not apply to the case of a contractor who performs no *personal* labor under the contract, is overruled, and the Court adhere to the rule laid down in *Shaw v. Bradley*, 59 Mich. 199. *Id.* (3).

LOGS AND LOGGING.

How. Stat. § 2035, which provides for the breaking of jams of logs caused by the failure of log-owners to make adequate provision therefor, and for driving the logs, gives a *new* remedy, and does not apply to cases where the parties interested have by contract fixed their rights and liabilities. 415 (1).

See CONTRACT; DAMAGES (2); LOG-LIEN LAW.

LOST INSTRUMENT—See EVIDENCE (23).

MALICIOUS PROSECUTION.

1. The defense in a case for malicious prosecution cannot be made out by proof that the prosecuting attorney acted in good faith in authorizing the prosecution. 350 (2).

2. Advice by a prosecuting attorney, based upon false statements of the defendant, is no defense in a suit for malicious prosecution. *Id.* (3).

See DAMAGES (1); EVIDENCE (14).

MANDAMUS.

The writ of *mandamus* will not be used to aid in the enforcement of an *illegal* claim. 548 (3).

MARRIED WOMAN.

1. A married woman is liable upon a joint and several bond, signed by herself and husband, given as security for money borrowed *by her*, and used in building a house upon *her* land. 472 (1).

2. This Court has gone no further than to hold that it is not sufficient to warrant a recovery against the wife upon the joint obligation of herself and husband to simply show that the materials for which the obligation was given went to improve her separate property. *Id.* (2).

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MASTER AND SERVANT—See FELLOW-SERVANTS.

MEASURE OF DAMAGES—See DAMAGES (2).

MECHANICS' LIEN LAW.

In this case, the judgment, so far as it establishes a personal liability against the defendant, is affirmed, but is held void so far as it gives plaintiff a lien under the mechanics' lien law of 1887, which was held unconstitutional in *John Spry Lumber Co. v. Loan & Trust Co.*, 77 Mich. 199. 311.

MERCANTILE AGENCY—See EVIDENCE (17).

MINING CORPORATIONS.

1. How. Stat. § 8408, giving laborers for a mining corporation in the Upper Peninsula of Michigan a lien for the amount due them for such labor upon all of the real and personal property of the corporation there situate, applies to the *personal* labor performed by an overseer and custodian of the mines and property of the corporation while in charge of its works and property. 275 (1).
2. All persons are bound to take notice that unpaid laborers for a mining corporation in the Upper Peninsula have a lien for their labor upon all of the real and personal property of the corporation in that portion of the State, which accrues and attaches as the labor is performed, and may be lost by laches, but not otherwise, unless by payment or satisfaction, or voluntary release or waiver. *Id.* (2).
3. How. Stat. §§ 8402–8404, provide for the enforcement of liens for labor performed for mining corporations in the Upper Peninsula by the commencement of a suit by summons, and in case of a failure to obtain personal service the plaintiff may proceed in all respects, as near as may be, as in suits commenced by attachment where personal service is not obtained upon the defendant. *Id.* (3).
4. How. Stat. § 8145, providing for the commencement of suits against foreign corporations where the cause of action accrues in this State, has no application to a suit for the enforcement of a lien for labor performed for a mining corporation in the Upper Peninsula, where no service is had upon any officer or agent of the corporation as provided by that section. *Id.* (4).

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MISTAKE.

In order to ascertain whether a mistake has been made in describing property in a deed, it is essential to ascertain the *intent* of the parties—the one in selling, and the other in buying—as to the subject-matter of the sale; and if the deed fails to express *that* intent, there is a mistake which can be relieved against in equity. 139.

MISTAKE OF LAW.

A wife died, possessed of personal estate, and leaving a son and his step-father as her heirs. Shortly before her death, at the request of the husband, the wife gave directions as to the disposition of her property, but not in such a manner as to be *legally* binding upon her heirs. The husband was appointed administrator of her estate, and disposed of the property according to her directions. He afterwards filed a bill against the guardian of the son, to whom he had delivered the major portion of the property, to secure its return to him as administrator, to be distributed according to law, claiming to have turned it over under a *mistake* as to his *legal rights*, having been advised by the judge of probate that the son was his mother's *sole* heir. On a review of the testimony the Court find that complainant did not act under any misinformation or mistake as to the law, and that ignorance of the law would not afford him relief, even if it existed, and a decree is entered dismissing his bill. 540.

MORTGAGE.

1. A resale will not be ordered in a foreclosure case upon an offer of increased price alone, when the property has not been sold at a sacrifice. 85 (1).
2. The following general propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—The practice of the English court of chancery, which is to open biddings before confirmation when an offer is made of an advance of 10 per cent. on the bid, and an indemnity to the purchaser, has not been adopted in this State.

b—When property is exposed for sale under a judicial decree, and offered to the highest bidder, and the sale is without fraud, and is fairly conducted, after proper notice, and the property is struck off to a third person, it will require a strong case, and some peculiar exigency, to warrant a court in setting it aside.

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MORTGAGE—Continued.

c—If an interested party is not barred by laches, a resale will be ordered where there has been fraud or misconduct in the purchaser; fraudulent neglect or misconduct on the part of other persons connected with the sale; or surprise or misapprehension, not attributable to the party's own fault, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducted such sale. *Id.* (2).

3. Complainant and nine others agreed to pay to defendant the sums set opposite their respective names as and for stock in a hotel building, which he agreed to erect, they to take as payment an interest and ownership in the building equal to the amount so paid. Defendant agreed to keep an itemized account of the cost of the building, and to exhibit it to the stockholders, on its completion, to enable them to ascertain the proportionate interest of each therein. The stockholders further agreed that, if on such completion defendant would furnish the building in a proper manner for a hotel, he should have its use as long as he kept it as a hotel, by paying to them 7 per cent. interest on the amount of their several subscriptions, all of which defendant agreed to do. Defendant erected the building and furnished it, and opened a hotel, and most of the stockholders paid their subscriptions. Defendant kept an account of the expense of construction for a time, and then ceased doing so, and claims to have lost the figures so kept, but testifies that the building cost between $9,000 and $10,000. No account of the cost was ever rendered, and no stock company was ever formed or stock issued.

In construing the agreement the Court held:

a—That it was the intention of the parties that upon the completion of the building its entire cost would stand for the capital invested, which was to be represented by stock, and each subscriber should have his share of the stock in proportion to the sum invested by each, which stock should represent an interest in real estate, and the money be permanently invested so long as defendant continued to keep the hotel.

b—That equity will look upon that as done which the parties intended should have been done, and the Court will treat the stock subscribed as having been issued, and as represent-

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MORTGAGE—Continued.

ing an interest in the hotel building equal in extent to its proportion to the whole sum invested in the building.

c—That the intention was that the stock should not be assigned to outside parties, but, if it had been intended to be *absolutely* non-transferable, the defendant, by acquiescing in the assignments to complainant, and paying him interest thereon, has waived such condition.

d—That the stock was secured by an equitable lien upon the real estate represented by it, and that payment of accrued interest is enforcible by a foreclosure in equity, but that payment of the principal of the subscriptions cannot be enforced so long as defendant keeps the hotel as such.

e—That, in order to ascertain the extent of the interest represented by the stock held by the owners of the stock subscriptions, there must be an accounting as to the cost of the building, and, as defendant has failed to keep an account of the same, proofs may be taken of what it was worth to build and complete it, and upon the coming in of the commissioner's report a decree of foreclosure may be entered subjecting that undivided interest in the hotel building, including the land covered by it, which is represented by the stock subscriptions *paid in*, to a sale to satisfy the interest due and unpaid, and the surplus, if any, to be paid over *pro rata* to the owners of the *paid up* subscriptions. 130, 131.

4. In this case an executor filed a bill for the foreclosure of a mortgage found in the testator's safe, and which the mortgagor claimed was given as indemnity for the indorsement of a note, which, after several renewals, was paid; and on an examination of the testimony the Court find in favor of the mortgagor's claim, and affirm the decree dismissing the bill. 152.

5. "Occupancy," within the meaning of How. Stat. § 8503, authorizing the sale together, on a mortgage foreclosure by advertisement, of separate lots occupied as one parcel, does not require that *all* of the land be fenced or improved. The actual inclosure of part carries with it the occupancy of the remainder, which is used, or intended to be used, as part of one farm. 249 (1).

6. Equity will compel the discharge from record of an outlawed mortgage without requiring proof of the actual payment of the mortgage debt. 427 (1).

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MORTGAGE—Continued.

7. This case presents the single question of the right of the complainant to redeem from a mortgage, or whether such right has been cut off by conveyances made by his grantor, and involves questions of fact purely; and the testimony is held to satisfy the Court that such right exists, and the decree below is affirmed. 532 (4).

See CHATTEL MORTGAGE; DRAIN LAW OF 1885 (*e*); EVIDENCE (10).

MUNICIPAL CORPORATIONS.

1. Act No. 264, Laws of 1887, providing for the recovery of damages for injuries caused by defective sidewalks, does not require that the municipality charged with keeping sidewalks in repair shall have *actual* notice or knowledge of the defects complained of; nor does it materially change the rule upon this subject laid down in construing the statute of 1879. 656 (3).

2. Act No. 264, Laws of 1887, expressly charges cities with the duty of keeping their sidewalks in repair, and provides for raising what money may be needed for that purpose within certain limits. The liability of such cities for a failure to perform this duty is expressly declared, and it is immaterial whether, under the provisions of their charters, they would be held so liable or not. *Id.* (4).

See STREET RAILWAYS.

NEGLIGENCE.

1. A railway company was in the habit of receiving and carrying passengers to and from the crossing of another road, without erecting a platform or station-house, but allowed passengers to board and leave trains at the statutory stopping place, 400 feet from the crossing. A passenger who had been accustomed to leave the train at *this* point heard the whistle for the crossing, and went to the car door, and as the train slowed up went out upon the platform to be ready to alight when it stopped, stepping down upon the lower step for that purpose. By reason of the turning of an air-cock the engineer was unable to control his train with the air brakes, which had worked perfectly at other stopping places. He whistled for hand-brakes, which signal was promptly responded to, but without stopping the train. The

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NEGLIGENCE—Continued.

passenger, when the train was about 166 feet from the crossing, jumped from the step, and was injured by the moving train. In a suit to recover the damages sustained it was claimed that the company negligently failed to stop the train at the usual stopping place; that its servants furnished the plaintiff no assistance in alighting; and that defendant negligently started the train, with sudden violence, while plaintiff was attempting to alight. In passing upon these claims the following propositions are stated by the Court:

a—No negligence is shown by the fact that the train ran past the usual stopping place. The train was equipped with the usual air brakes required by law. They were in good condition when the train started out. The turning of the air-cock was the sole cause of the inability of the engineer to control the train. How it became turned is wholly unexplained. The mere fact that it was turned is not of itself evidence of negligence. If it was turned by an accident which ordinary prudence could not have foreseen and prevented, or if it was designedly turned by some one not in defendant's employ, the defendant cannot be held liable. The burden of proof was upon the plaintiff to show that it was turned through the negligence of the defendant. This she has failed to do.

b—All the trainmen were at the time at their posts of duty, attempting to stop the train, in obedience to the requirements of law. The station had not been announced, nor had the train stopped. The plaintiff had not been invited to alight. It is fair to presume that, if the trainmen had been near her, they would have prevented her from alighting, instead of assisting her to alight. It would certainly have been their duty to use all proper means for that purpose while the train was in motion. Under these circumstances, this allegation of negligence falls.

c—There is some evidence tending to show that the train, after it had slowed down, suddenly started up. But one cannot read the record without being convinced that the train gradually slowed down, till it came to a full stop when across the track of the other road. Be that as it may, the record fails to show that the sudden starting of the train had anything to do with the accident to plaintiff. No witness testifies that it started up when she was in the act of alighting.

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NEGLIGENCE—Continued.

Her own testimony is conclusive that it did not. Under the record, there was no proof of negligence, and the circuit judge should have so instructed the jury. 156, 157.

2. If a person erects insufficient or dangerous structures upon his own lands, personally or by contract, and third persons are injured, he will be liable for failing to observe the duty to keep his premises safe, and in such condition as not to cause injury to others lawfully thereon. 166.
3. "When one, expressly or by implication, invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." 172 (1).
4. The question of negligence is usually one for the jury to determine under all of the circumstances of the case; but where the negligence of a defendant is shown by undisputed evidence, it is purely a question of law, to be determined by the court. *Id.* (2).
5. Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon inferences to be drawn from facts and circumstances about which honest, intelligent, and impartial men might differ, such a case should be submitted to the jury. *Id.* (3).
6. This case is ruled by *Robinson v. Railroad Co.*, 79 Mich. 323, where the owner of cattle is held guilty of contributory negligence in turning them loose in a public highway, near a railroad crossing, without a keeper, the road being properly fenced, etc. In this case the cattle entered upon the grounds of the company at a place where it was not required to maintain a fence. 197.
7. Where the plaintiff's testimony in a negligence case shows that there was a clear space on a planked drive-way of at least 14 feet outside of that occupied by the plaintiff's wagon in which the driver of defendant's team might have passed, leaving from six to eight feet space between his load and the plaintiff, who was standing beside his wagon with his back towards such open space,—both parties having a right to be in such drive-way,—it is for the jury to say whether such driver exercised ordinary care and prudence in driving within 6 to 12 inches of plaintiff's wagon, he at the time sitting on

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NEGLIGENCE—Continued.

his load, consisting of from 40 to 50 bags of clover seed, and the hind wheel of his truck catching plaintiff's foot and throwing him between the vehicles, and severely injuring both of his legs. 260 (1).

8. In such a case the reputation of defendant's driver as a careful driver is not in issue, and is immaterial. 261 (2).

9. It is competent to show that plaintiff was loading his wagon in the customary way in such drive-way, and that defendant's driver knew what the customary way of loading was there, as affecting the question of his negligence in driving as close as he did to plaintiff's wagon. *Id.* (3).

10. It is the duty of a railway company to provide a reasonably safe and convenient means of reaching its station, and if, with full knowledge of the facts, it permits an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as if it had itself set up and maintained the dangerous way. 390 (1).

See CHARGE TO JURY (4); EVIDENCE (24); MUNICIPAL CORPORATIONS; PLEADING (2).

NOTICE—See MUNICIPAL CORPORATIONS; STREET-OPENING CASE (3, 4).

NOTICE OF SPECIAL DEFENSE—See PRACTICE IN CIRCUIT COURT (1).

NUISANCE—See LANDLORD AND TENANT (2).

OCCUPANCY—See MORTGAGE (5).

OFFICE—See QUO WARRANTO.

OFFICERS—See COUNTY OFFICERS.

OFFICIAL BONDS—See BONDS (2-4).

OPENING OF COUNSEL—See PRACTICE IN CIRCUIT COURT (5).

OVERRULED CASES.

1. The case of *Nurney v. Insurance Co.*, 63 Mich. 633, is not understood as holding that an agreement to submit the ascertainment of unliquidated damages to arbitration, as a condition precedent to bringing suit, is invalid, or that either party

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OVERRULED CASES—Continued.

thereto can revoke it at his own will; but that the right to such arbitration, upon the facts in that case, was waived, which waiver necessarily left the parties in the same situation as if no such agreement had been made, which is understood to be the doctrine of that case; and, if it was intended to establish a different rule, it is hereby expressly overruled. 117 (*d*).

2. *Kieldsen v. Wilson*, 77 Mich. 45, in so far as it holds that Act No. 229, Laws of 1887, does not apply to the case of a contractor who performs no *personal* labor under the contract, is overruled, and the Court adhere to the rule laid down in *Shaw v. Bradley*, 59 Mich. 199. 254 (8).

PARTIES—See ACTION.

PARTNERSHIP.

1. In a proceeding to charge one person with a liability in conjunction with another, the issue is not necessarily upon the existence of a partnership between them, but upon the performance of an act to which the law attaches a joint obligation. 302.

2. Where, for nearly 25 years, a partnership business was carried on without written accounts as between the partners, the evidence of their dealings resting in parol, during which time each one drew from the business as his needs required, without question or protest from his partners, the safest and most equitable course is to leave the partners as they left themselves at time of the practical dissolution of the firm at the expiration of said term of years. 518 (1).

3. At an execution sale to satisfy a judgment owned by a partnership, one of the *three* partners bid in the land in his own name, and assumed to apply the purchase price on the judgment. He received the usual sheriff's deed, and about a year and a half afterwards the other partners deeded their interest in the land to a third party, who filed a bill to compel a conveyance to him by the other partner of an undivided two-thirds of the land, and secured a decree for such conveyance, subject to the defendant's rights on a final settlement between the partners, should an accounting be thereafter had between them. The theory of the bill was that the action of the defendant was unknown to his part-

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PARTNERSHIP—Continued.

ners, he concealing it from them until after the dissolution of the partnership, and that they *each* had an equitable estate in an undivided third of the land. The defendant's claim was that the firm received more than the price the land sold for from him many years before, which money was never repaid or drawn out by him, and that he used so much of the judgment as he did in preference to drawing the money from the firm business, as less liable to injure the firm, and that his action was in harmony with the general practice of each partner. He denied that any dissolution had ever taken place, except as the firm ceased to do business, or that any settlement or accounting had ever been had between the partners. On a review of the testimony the defendant's version is found to be correct, and the decree is reversed and the bill dismissed. *Id.* (2).

PAYMENT—See CHATTEL MORTGAGE (1, 2, 4).

PERSONAL LIABILITY—See MECHANICS' LIEN LAW.

PLEADING.

1. A statement in a declaration in replevin, immediately following the description of the property, that it is an invoice of goods sold by the plaintiffs to the defendants' mortgagor, is mere description, and in no way affects the right of the plaintiffs to proceed as upon a rescission of the sale of the goods for the alleged fraud of the mortgagor in making the purchase. 882 (2).

2. Objections to a declaration in a negligence case on the ground that it fails to point out the *exact* place of the accident should be taken by demurrer; and it is too late to raise them on the trial. 655 (1).

See BILL OF PARTICULARS; CHATTEL MORTGAGE (1); EVIDENCE (2, 20, 24); LANDLORD AND TENANT (3); LIQUOR TRAFFIC (1); PRACTICE IN CIRCUIT COURT (1).

POLICE COURT OF GRAND RAPIDS.

The police court of the city of Grand Rapids has jurisdiction to examine and hold to bail persons charged with the violation of the liquor law of the State, or with other misdemeanors not triable before a justice of the peace. 611.

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POOR PERSONS.

The proceedings in this case were commenced under How. Stat. chap. 41, to compel the respondents (plaintiffs in *certiorari*) to maintain their aged and infirm father, and an order was made accordingly, which is sought to be set aside for want of evidence to warrant the court in making it; and it is held that there was some evidence introduced on the hearing, which was in open court, which warranted the order complained of, and it is affirmed. 327.

POSSESSION—See FRAUDULENT CONVEYANCES.

POSSESSION OF LAND—See TRESPASS.

PRACTICE IN CIRCUIT COURT.

1. There is no practice authorizing a defendant to interpose a special notice of defense, setting forth the opinion of the Supreme Court on reversing a judgment recovered by the plaintiff on a former trial. 2 (*a*).
2. The reading by counsel for plaintiff of the former opinion in this case, accompanied with a statement that the Court had passed upon the question of contributory negligence favorably to plaintiff, is held to have been highly improper. 154 (1).
3. A party cannot change front, after prosecuting his suit through the courts upon one theory and state of facts, and present a different theory. 296 (1).
4. The business of courts cannot be delayed to suit the convenience of suitors.

   So *held*, where, after the counsel for plaintiff had announced themselves as satisfied with the jury, the defendant's counsel stated that his client was absent, and that he did not desire to examine or impanel the jury until he arrived, and was directed to proceed with the examination, and the jury was impaneled in the defendant's absence. 443 (1).
5. It would be a very narrow rule which restricted the opening statement of counsel to the jury to facts which should prove to be admissible in evidence under the strict rules governing the admission of testimony. 656 (5).

See BILL OF PARTICULARS.

PRACTICE IN SUPREME COURT—See CRIMINAL LAW (1, 2); QUO WARRANTO.

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PRESUMPTION.

Where a foreman who has been receiving $125 per month for several years is engaged for another year without anything being said as to the wages to be paid, they will be presumed to continue at the old rate. 422 (1).

PRINCIPAL AND AGENT—See LIQUOR TRAFFIC (5).

PRIVILEGED TESTIMONY—See CRIMINAL LAW (7).

PROCESS—See EVIDENCE (16); SERVICE OF PROCESS.

PROCLAMATIONS—See LEGAL HOLIDAYS.

PROSECUTING ATTORNEY—See CRIMINAL LAW (1, 2, 6, 13); MALICIOUS PROSECUTION.

PUBLIC OFFICERS—See BONDS (2-4); COUNTY OFFICERS.

PUBLIC POLICY—See TAXES (3).

PUBLIC RECORDS.

The following books, kept in the office of the city treasurer of Detroit, namely:

a—One book containing the record of the certificates of canceled tax sales;—

b—One book containing a list of such lots as have been sold to the city, or to individuals, for special city taxes, and have been from time to time redeemed;—

c—One book containing a list of such lots or parcels of land in the city of Detroit as have been heretofore sold to said city for delinquent city taxes, said sales having been afterwards assigned by the city to individuals;—

Which books are denominated by the treasurer as "*Stub Receipt Books*," who claims that they are mere *memoranda* for the convenience of the office, and that all the *data* contained therein is entered in the "Record Books," which are accessible to the public, but which transfer of *data* to such record books might be delayed for days or weeks, at the pleasure of the treasurer, are *public records* in the treasurer's office, in the full sense of Act No. 205, Laws of 1889, and under the opinion of this Court in *Burton v. Tuite*, 78 Mich. 363. 218.

QUESTION OF FACT—See NEGLIGENCE (4, 5).

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QUESTION OF LAW—See NEGLIGENCE (4).

QUITCLAIM DEED.

A grantee in a quitclaim deed is not a *bona fide* purchaser, and takes only the interest of his grantor. 124.

QUO WARRANTO.

In the case of an intrusion upon an office, the Court has discretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by such judgment. 484 (1).

RAILROAD COMPANIES—See CONSTITUTIONAL LAW (1); NEGLIGENCE (1, 6, 10).

RECORDS—See PUBLIC RECORDS.

REFORMING DEED—See MISTAKE.

REFRESHING RECOLLECTION OF WITNESS—See EVIDENCE (17).

RELEASE OF INDORSER—See BILLS AND NOTES (4).

RELIGIOUS SOCIETIES.

It would be quite unseemly, as well as detrimental to the best interests and harmony of religious societies, if courts should interfere with their internal affairs when no property rights are involved, simply because the regularity of their proceedings may be open to question by some disaffected party. 484 (2).

REMOVAL FROM OFFICE—See COUNTY OFFICERS.

RENEWAL NOTES—See BILLS AND NOTES (1).

REPLEVIN.

1. This is an action of replevin for saw-logs, a portion of which were cut from lands owned by the defendants, and upon which they placed their mark, but made no claim to the remainder of the logs, and exercised no acts of ownership over them; and it is held that the only question to be submitted to the jury was the amount of the logs taken belonging to the defendants, and their value, they having waived a return. 470.
2. In replevin the appraised value of the property is not con-

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REPLEVIN—Continued.

clusive, and is accepted only in the absence of more satisfactory evidence; but the Court will conclude, from the failure of the plaintiffs to contest such valuation, that they are satisfied with it. 476 (3).

3. In replevin from a sheriff of property seized on execution, he may elect to waive a return, and may take judgment for the amount of his lien, which is established by the judgment. The acceptance of a verdict for the value of the lien, and causing judgment to be entered thereon, is sufficient evidence of such election. *Id.* (4).
4. The Court distinguished this case from *Frederick v. Circuit Judge*, 52 Mich. 529. In that case the sheriff held the goods under an attachment, and at the time of the trial of the replevin suit no judgment had been rendered in the attachment suit. *Id.* (5).

See COSTS (1).

REPUTATION—See NEGLIGENCE (3).

REQUESTS TO CHARGE.

1. A request to charge which assumes that the jury may find that a parol agreement was not made suspending a written contract, when both parties insist that one was made, and the only dispute is as to the place where it was made, and its terms, is objectionable, as is one which only submits to the consideration of the jury the parol agreement claimed by one of the parties. 415 (2).
2. A temporary suspension of work under a contract, for apparently good reasons, and without objection from the party affected thereby, cannot be construed into an abandonment of the contract. 416 (3).

RES JUDICATA.

Where, in a suit upon two promissory notes against indorsers, a judgment in favor of the plaintiff is reversed on the ground that the record shows that the notes have been paid, a judgment in favor of the defendants on a second trial will stand affirmed, unless the record discloses a different state of facts upon the question of such payment. 8 (*b*).

REVOCATION OF AUTHORITY OF ARBITRATOR—See ARBITRATION.

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SALE.

In this case it is held that a bill of sale of timber, executed in fulfillment of a contract for such sale, in which the vendor retained the title as security for the payment of the purchase price, passed an absolute title to the timber. 67.

See MORTGAGE (1, 2).

SALE IN ONE PARCEL—See EVIDENCE (10).

SCHOOLS AND SCHOOL-DISTRICTS.

1. It has never been claimed, so far as we are aware, that school boards have the power to furnish *free* text-books except by virtue of special legislation. 548 (1).
2. The action of the board of education of the city of Detroit in including in its annual estimate a sum for free text-books, in the absence of authority from a majority of the qualified electors as provided by section six of Act No. 147, Laws of 1889, is *absolutely* void. *Id.* (2).

SENTENCE ON PLEA OF GUILTY—See CRIMINAL LAW (19).

SERVICE OF JUSTICES' SUMMONS—See EVIDENCE (16).

SERVICE OF PROCESS.

Proof of service of process to give the court jurisdiction cannot rest in parol. 367 (*a*).

SETTLEMENT.

1. It cannot be true, as a legal proposition, that, in every case where there is an honest difference of opinion in reference to the terms of the contract, or where the buyer, in good faith, objects to the quality of goods purchased as not being up to the standard of the contract of purchase, upon adjustment of differences and settlement the seller may, with an intention of instituting a suit upon a claim of being defrauded in the settlement thereafter to be made, proceed to such adjustment, and to a compromise and settlement of the demand, and recover from the purchaser damages for an alleged fraud in the settlement. 431 (1).
2. Fraud and overreaching in the compromise and settlement of claims have been regarded as affording grounds for the recovery of damages in actions of trespass on the case; but no court has gone so far as to hold that a settlement volun-

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SETTLEMENT—Continued.

tarily sought and made, where there has been no concealment of facts and no misrepresentations which have induced a party to enter into the compromise, and where there has been an honest difference of opinion as to the subject-matter compromised, furnishes a ground for such an action. *Id.* (2).

SIDEWALKS—See MUNICIPAL CORPORATIONS.

SOLDIERS' BOUNTIES—See WAR BOUNTIES.

STATION—See NELIGENCE (10).

STATUTE OF AMENDMENTS.

1. In this case the indorsements appearing upon the notes received in evidence were not correctly set up in the declaration; and it is held that an amendment should have been allowed in the furtherance of justice, if asked for, which was not done, and the judgment is reversed. 313.
2. Courts have liberally construed the statute of amendments in matters of form, where it is clear that no injustice can be done; but amendments without which the court obtains no jurisdiction to try the case can only be made by the trial court, and upon notice to the opposite party, who is entitled to make a showing. 367 (*b*).
3. A justice of the peace has no power to amend his judgment record by changing the Christian name of the defendant, although consented to by both parties. 368 (*f*).

STATUTE OF FRAUDS.

In this case it is held that there was testimony which, if believed by the jury, was sufficient to support the claim of plaintiff that defendant, through her agent, agreed to pay a hotel bill due the plaintiff from a contractor of defendant, and that plaintiff, in reliance upon such agreement, released the original debtor. 234.

STATUTE OF LIMITATIONS.

1. The contract of the State of Michigan with her volunteer soldiers, evidenced by the several "war bounty acts," so called, is not affected by the statute of limitations. 206 (*c*).
2. Equity will compel the discharge from record of an outlawed mortgage without requiring proof of the actual payment of the mortgage debt. 427 (1).

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STATUTE OF LIMITATIONS—Continued.

3. The commencement of suit in which jurisdiction is obtained over the person of the defendant fulfills the purposes of the statute of limitations as to *that* cause of action by affording to the plaintiff his remedy. 504 (1).

4. The court having obtained jurisdiction over the person of the defendant, he is considered as being present in the forum during the pendency of the suit for all purposes of the remedy, and consequently as to *that* cause of action the statute is operative and running during the pendency of the suit. *Id.* (2).

5. While such suit is pending no new suit can be commenced for the same cause of action, nor afterwards, if the limitation of time has elapsed during the pendency of the *first* suit. *Id.* (3).

See MORTGAGE (6); WAR BOUNTIES (*b*).

STATUTES CONSTRUED.

1. Under the provisions of How. Stat. § 5808, providing for granting letters testamentary on the proof of foreign wills, the estate must be disposed of in accordance with the directions contained in the will. 42 (1).

2. The object of How. Stat. § 5531, which prohibits the suspension of the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, was to prevent the accumulation of large landed estates to be held in perpetuity, or for a long series of years, and said statute is not violated by the direction in a foreign will, admitted to probate in this State, that Michigan lands shall be sold, and the proceeds invested in lands in another state, there to be held for any number of lives. 43 (5).

3. U. S. Rev. Stat. § 4282, exempting vessel-owners from liability by reason of loss of or damage to goods by any fire happening to or on board of the vessel, is limited in its application to fires happening on ship-board. 90 (*d*).

4. Upon application to the chancery court to exercise its supervisory powers over common-law assignments, the assignment becomes a civil proceeding pending in the circuit court, and is subject to be transferred under How. Stat. §§ 6495–6502, which provide for the transfer of suits from one circuit to

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STATUTES CONSTRUED—Continued.
another where the presiding judge is disqualified to sit in the cause. 200 (1).

5. The right of soldiers coming within the provisions of Act No. 23, Laws of 1864, to a State bounty of $100, became a vested right, of which the Legislature could not lawfully deprive them. 205 (*a*).

6. The proviso to Act No 173, Laws of 1881, repealing the war-bounty acts of 1864 and 1871, recognized and preserved the rights of soldiers to their bounty under said acts, and is a distinct waiver, if one was needed, of the statute of limitations. *Id.* (*b*).

7. It was the duty of the Legislature to provide money for the payment of the war bounty offered by the State under Act No. 23, Laws of 1864, and the history of those times, of which the Court will take judicial notice, shows that that duty was performed. 206 (*d*).

8. The Legislature by the acts of February 5, 1864, March 2, 1865, and March 21, 1865, provided ample means for paying the bounties offered under Act No. 23, Laws of 1864. These acts authorized and directed the Governor and State Treasurer, whenever necessary for the purpose of paying State bounties, to contract loans and issue bonds therefor, and pay the avails over to the credit of the "war fund," which bounties were directed to be paid from this fund upon the warrant of the Auditor General, upon proper vouchers or estimates of the Quartermaster General of the State, certified by the Governor. This was a sufficient appropriation by the Legislature, and authorized the Auditor General, until the passage of Act No. 173, Laws of 1881, to draw his warrant on this "war fund" whenever the money for the purpose of paying bounties reached that fund, upon proper certificates of the Quartermaster General and Governor. *Id.* (*e*).

9. The object and intent of the Legislature, in the passage of Act No. 173, Laws of 1881, was to do away with the authority of the Quartermaster General in allowing claims for bounties, and place claimants for bounties in the same category as others having claims against the State for adjustment. *Id.* (*f*).

10. The following books, kept in the office of the city treasurer of Detroit, namely:

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STATUTES CONSTRUED—Continued.

a—One book containing the record of the certificates of canceled tax sales;—

b—One book containing a list of such lots as have been sold to the city, or to individuals, for special city taxes, and have been from time to time redeemed;—

c—One book containing a list of such lots or parcels of land in the city of Detroit as have been heretofore sold to said city for delinquent city taxes, said sales having been afterwards assigned by the city to individuals;—

Which books are denominated by the treasurer as "Stub Receipt Books," who claims that they are mere *memoranda* for the convenience of the office, and that all the *data* contained therein is entered in the "Record Books," which are accessible to the public, but which transfer of *data* to such record books might be delayed for days or weeks at the pleasure of the treasurer, are public records in the treasurer's office, in the full sense of Act No. 205, Laws of 1889. 218.

11. The mode of service of garnishee process upon foreign corporations is absolutely within the discretion of the Legislature; and their right to do business in this State is dependent upon a compliance with Act No. 266, Laws of 1889, which authorizes such service to be made upon any officer or agent of the corporation found within this State, whether here upon corporate business or not. 242 (1).

12. The power of a commissioner of highways to adjourn the hearing of an application to lay out a highway is limited to twenty days by How. Stat. § 1300, and a longer adjournment ousts him of jurisdiction. 247.

13. "Occupancy," within the meaning of How. Stat § 8503, authorizing the sale together, on a mortgage foreclosure by advertisement, of separate lots occupied as one parcel, does not require that all of the land be fenced or improved. The actual inclosure of part carries with it the occupancy of the remainder, which is used, or intended to be used, as part of one farm. 249 (1).

14. The language of section 1, Act No. 229, Laws of 1887, giving any person who performs any labor or services in manufacturing lumber a lien thereon for the amount due for such labor or services, is free from ambiguity, and gives such lien to the owner of a saw-mill who manufactures lumber under a sawing contract; and the fact that such mill-

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STATUTES CONSTRUED—Continued.
owner has a lien at common law is of no consequence in the face of this provision. 254 (1).

15. How. Stat. § 1007, provides that all resident real estate shall be assessed to the person occupying it on the second Monday of May, unless the same shall be given in by some other person for assessment to him, and an assessment contrary to such provision is void. 257 (1).

16. The failure of the sureties upon a township drain commissioner's bond to justify, pursuant to Act No. 179, Laws of 1885, does not necessarily create a vacancy in the office, said bond having been approved and the proper oath of office having been filed. 265 (1).

17. Act No. 179, Laws of 1885, requiring sureties upon official bonds to justify, does not, in terms, make such justification a condition precedent to the entry of the principal upon the discharge of the duties of his office. *Id.* (*a*).

18. How. Stat. § 8408, giving laborers for a mining corporation in the Upper Peninsula of Michigan a lien for the amount due them for such labor upon all of the real and personal property of the corporation there situate, applies to the personal labor performed by an overseer and custodian of the mines and property of the corporation while in charge of its works and property. 275 (1).

19. How. Stat. §§ 8402–8404, provide for the enforcement of liens for labor performed for mining corporations in the Upper Peninsula by the commencement of a suit by summons, and in case of a failure to obtain personal service the plaintiff may proceed in all respects, as near as may be, as in suits commenced by attachment where personal service is not obtained upon the defendant. *Id.* (3).

20. How. Stat. § 8145, providing for the commencement of suits against foreign corporations where the cause of action accrues in this State, has no application to a suit for the enforcement of a lien for labor performed for a mining corporation in the Upper Peninsula, where no service is had upon any officer or agent of the corporation as provided by that section. *Id.* (4).

21. Act No. 187, Laws of 1887, revising the laws providing for the incorporation of co-operative and mutual benefit associations, only applies to corporations organized under it, and

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STATUTES CONSTRUED—Continued.

cannot be made to apply to insurance contracts made or attempted to be made prior to its enactment. 332 (1).

22. In construing Act No. 227, Laws of 1885 (drain law), the following points are decided:

a—The primary petition for the construction of the drain need not state that it is necessary for the public health or highways; citing chap. 3, § 1; *Gillett v. McLaughlin*, 69 Mich. 547.

b—The application to the probate court is not required to be verified; citing chap. 3, § 5.

c—An application referring to the "annexed original determination of the drain commissioner," which contains a description of the land traversed by the drain, and of the drain, is sufficient.

d—The petition for the establishment of the drain need not contain an accurate description of *termini* and route for the proposed drain; citing chap. 3, § 3; *Kinnie v. Bare*, 68 Mich. 625.

e—Mortgagees do not come within the description of persons entitled to notice of hearing; citing chap. 3, §§ 6, 7.

f—The statute does not require the hearing of the application to be had within 40 days from its filing with the probate court, the court having power to adjourn the same; citing chap. 3, §§ 6, 8; and an announcement of such an adjournment made in open court is a sufficient notice to all parties who have been served with citation, whether present or not. 345.

23. Act No. 101, Laws of 1885, authorizing the assignment of errors on the charge of the court without exceptions to support them, does not cover an omission or refusal to charge. 350 (5).

24. Stock issued by an association organized under How. Stat. chap. 188, for "yachting, hunting, fishing, boating, rowing, and other lawful sporting purposes," is not subject to levy and sale on execution under How. Stat. § 7697, authorizing the sale on execution of the share or interest of a stockholder in any bank, insurance company, or any other joint-stock company, incorporated under the laws of this State. 371.

25. Whether How. Stat. § 4247, which limits insurance by mutual fire insurance companies to buildings that constitute detached risks in villages and cities, refers to incorporated

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STATUTES CONSTRUED—Continued.
or platted villages, is not decided, the Court not being inclined to so limit it. 407 (1).
26. How. Stat. § 2035, which provides for the breaking of jams of logs caused by the failure of log-owners to make adequate provision therefor, and for driving the logs, gives a new remedy, and does not apply to cases where the parties interested have by contract fixed their rights and liabilities. 415 (1).
27. The testimony of a daughter of a claimant against the estate of a deceased person, as to admissions made by the deceased, is not incompetent under How. Stat. § 7545, prohibiting the opposite party from testifying to matters which, if true, must have been equally within the knowledge of the deceased. 472 (3).
28. Act No. 72, Laws of 1887, which makes it the duty of the prosecuting attorney to appear in the Supreme Court in criminal cases removed from his county, is construed as requiring him to furnish a brief and make the main argument, but the management of the case remains under the control of the Attorney General. 501 (2).
29. An appeal properly claimed, perfected, and allowed in the probate court ought not to be dismissed for a failure to file the record in the circuit court within the thirty days limited by Act No. 175, Laws of 1887, if such record is filed before the motion to dismiss is actually heard. 511.
30. A demand for the examination of witnesses in open court (under How. Stat. § 6647) does not deprive the court of the right to direct an accounting in a proper case before a commissioner. 532 (3).
31. The action of the board of education of the city of Detroit in including in its annual estimate a sum for free text-books, in the absence of authority from a majority of the qualified electors as provided by section six of Act No. 147, Laws of 1889, is absolutely void. 548 (2).
32. In a prosecution for engaging in the sale of liquors without having paid the tax required by Act No. 313, Laws of 1887, the information must show that the defendant is not a "druggist who sells liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with law," thus negativing the exception found in the third section of the act. 578.

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STATUTES CONSTRUED—Continued.

33. A prosecuting attorney, who is attorney for the plaintiff in a pending suit, is disqualified, under Act No. 32, Laws of 1883 (amendatory of How. Stat. § 557), from prosecuting the defendant in replevin for larceny alleged to have been committed in recapturing the property replevied, the title of the plaintiff in replevin, and the state of facts under which he claims to maintain his title to the property, being the same as those upon which the charge of larceny is predicated. 580 (1).

34. The term "all legal holidays," as used in section 17 of the liquor law of 1887, includes all days set apart by the Governor or President of the United States as days for fasting and prayer, or of thanksgiving. 588 (1).

35. All persons engaged in the sale of liquor in an open saloon on a legal holiday are made principals by section 24 of the liquor law of 1887, and all may be punished for the violation of the statute if proceeded against and convicted. *Id.* (3).

36. How. Stat. § 9180, providing a distinct punishment for horse-stealing, is constitutional, and does not supersede the general statute against larceny. 634 (1).

37. How. Stat. § 9252, does not attempt to punish any person for falsely assuming to be a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, but for falsely assuming to be, and taking upon himself to act as, such officer. 646.

38. The specified causes for which new bonds might be required of liquor dealers by county treasurers, namely, "the death, insolvency, or removal of either of the sureties," were not illegally laid down in the liquor tax law of 1887, but no method was provided of getting at the facts by a hearing before any one; which defect would have been cured by Act No. 213, Laws of 1889, if it had become a law. 648.

39. Act No. 264, Laws of 1887, providing for the recovery of damages for injuries caused by defective sidewalks, does not require that the municipality charged with keeping sidewalks in repair shall have actual notice or knowledge of the defects complained of; nor does it materially change the rule upon this subject laid down in construing the statute of 1879. 656 (3).

40. Act No. 264, Laws of 1887, expressly charges cities with the duty of keeping their sidewalks in repair, and provides for raising what money may be needed for that purpose

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STATUTES CONSTRUED—Continued.

within certain limits. The liability of such cities for a failure to perform this duty is expressly declared, and it is immaterial whether, under the provisions of their charters, they would be held so liable or not. *Id.* (4).

41. So much of section 11 of Act No. 383, Local Acts of 1889, as confers upon the commissioners of parks and boulevards the authority to make all suitable and needful rules and regulations respecting the use of Belle Isle bridge and its approaches by foot-passengers, etc., cannot be upheld, as it places in the hands of an administrative body legislative authority, which is vested by the charter in the common council of the city of Detroit. 663 (3).

STOCK—See CORPORATIONS (1).

STOCK AND STOCKHOLDERS—See MORTGAGE (3).

STOCK RUNNING AT LARGE—See NEGLIGENCE (6).

STREET-OPENING CASE.

1. Art. 18, § 2, of the Constitution, provides for a jury of twelve *freeholders* where private property is taken for the use of the public, and a provision of a city charter that the jury, in such a case, shall be composed of twelve inhabitants of the city, qualified to serve as jurors in courts of record, is repugnant to such constitutional provision, such jurors not being required to be freeholders. 328 (1).

2. The oath administered to the jury in a street-opening case is the measure and limit of their legal action, and must plainly require them to determine the *necessity* of taking the land sought to be acquired for *public use;* and an oath which simply requires the jury "to ascertain the necessity for *using* the property intended to be taken, if it be intended to take any, for such improvement," is not sufficient. *Id.* (2).

3. A city charter which requires the marshal to make his return of the service of notice in a street-opening case *at least* six days before the day appointed for the hearing means six *full* days. 329 (3).

4. A charter provision requiring that notice of a resolution in a street-opening case, and of the proposed action thereunder, shall be posted in some conspicuous place upon the property

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STREET-OPENING CASE—Continued.

intended to be taken, where substituted service is required, is construed as requiring such notice to be posted on the land of the absent respondent. *Id.* (4).

5. A resolution in a street-opening case is held fatally defective because not containing the separate descriptions of the land proposed to be taken, and the names of the several owners. *Id.* (5)

STREET RAILWAYS.

A street railway company, which receives its franchise from a village whose charter does not expressly confer upon the municipality power to authorize the use of its streets for street railway purposes without compensating adjoining owners, and which power is neither necessary, essential, nor indispensable to enable the municipality to carry out the objects and purposes for which it was created, accepts such franchise subject to the right of the Legislature to prescribe such compensation as a condition precedent to the use of such streets for the construction of *new* lines of road. 77 (3).

See CONSTITUTIONAL LAW (1).

SUPPORT OF POOR PERSONS—See POOR PERSONS.

SURETIES—See BONDS.

SURETY.

Good faith and fair dealing is all that is required of a creditor in his transactions with a debtor who occupies the position of a surety to a contract, and these do not require the creditor to inform such surety of *other* and independent transactions with the principal debtor. 3 (*g*)

TAXES.

1. How. Stat. § 1007, provides that all resident real estate shall be assessed to the person occupying it on the second Monday of May, unless the same shall be given in by some other person for assessment to him, and an assessment contrary to such provision is void. 257 (1).
2. In this case a deed issued by the Auditor General for drain taxes is set aside for defects in the proceedings of the drain commissioner. *Id.* (2).
3. A note taken by a township treasurer in his own name, on

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TAXES—Continued.
the sale of property for taxes, is void in his hands on the ground of public policy. 552 (1).

See EVIDENCE (15).

TEXT-BOOKS—See SCHOOLS AND SCHOOL-DISTRICTS.

TITLE HELD IN TRUST—See TRUSTEES (2).

TRANSFER OF CAUSE—See ASSIGNMENT FOR BENEFIT OF CREDITORS.

TRESPASS.

1. In trespass to lands, where the defense of title is interposed, the plaintiff must either show possession or paramount title in himself. 359 (1).
2. Paying taxes upon wild and uninclosed land, and occasionally looking it over, and requesting neighboring residents to report if it was trespassed upon, will not give the party asserting such acts of ownership such a *possession* as will entitle him to maintain an action of trespass. *Id.* (2).
3. A defendant in a trespass suit who entered into possession under a tax deed, and cleared up and fenced a small portion of the land, and planted a crop, and was in actual possession, claiming under said deed, is in a position to contest the plaintiff's title, the deed, though conceded to be void, giving him color of title to the whole premises. *Id.* (3).

TRUSTEES.

1. To hold a bank as trustee, *simply* because its president and financial manager is a trustee for the benefit of creditors, would operate harshly and unjustly upon the rights of a majority of its stockholders, and make them responsible for acts which neither they nor the board of directors of the bank ever authorized or assented to, and would unjustly condemn them to losses concerning which they have never had a hearing in a court of justice. 4 (*i*).
2. Where A. and B. purchased adjoining lots, and went into possession before receiving their deeds, which, when executed, by mistake conveyed the lot purchased by A. to B., and *vice versa*, and after the death of B. his heirs filed a bill to correct the mistake, and obtained a decree vesting the title of the lot *purchased* by B. in them, but making no provision

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TRUSTEES—Continued.

for a transfer of the title to the lot purchased by A. to the owner, the heirs will thereafter hold such title in trust for A, or those claiming under him. 531 (2).

See TRUSTS IN LAND.

TRUSTS IN LAND.

1. Trusts in land for the benefit of third persons cannot be established by *parol* understandings with the grantor. 222 (1).
2. A deed from a husband to his brother of 160 acres of land, containing a declaration that the lands are conveyed in trust for the benefit of the grantor and his wife, who are to have the use and benefit of the land, being the income thereof, during their natural lives, and from which deed the word "heirs" was stricken before its execution, is held to have created a *passive* trust; that the title of the grantee was merely nominal; and that the legal title passed at once to the beneficiaries. *Id.* (2).

See TRUSTEES (2).

VACANCY—See BONDS (2–4).

WAGES.

Where a foreman who has been receiving $125 per month for several years is engaged for another year without anything being said as to the wages to be paid, they will be presumed to continue at the old rate. 422 (1).

WAIVER.

A debtor waives no rights by his silence when he is not called upon to act. 117 (*e*).

See LOG-LIEN LAW (2); MINING CORPORATIONS (2).

WAR BOUNTIES.

1. *Mandamus* will not lie to compel the Auditor General to draw his warrant on the State treasury in payment of the war bounty of $100 due a soldier under Act No. 23, Laws of 1864, there being no money in the treasury out of which such warrant could be lawfully paid, and none appropriated for that purpose, as shown by the Auditor General's return. 205 (1).

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WAR BOUNTIES—Continued.

2. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—The *right* of soldiers coming within the provisions of Act No. 23, Laws of 1864, to a State bounty of $100, became a *vested* right, of which the Legislature could not lawfully deprive them.

b—The proviso to Act No. 173, Laws of 1881, repealing the war bounty acts of 1864 and 1871, recognized and preserved the rights of soldiers to their bounty under said acts, and is a distinct waiver, if one was needed, of the statute of limitations.

c—Plighted faith between the State and her soldiers, who in the hour of the country's peril enlisted in defense of the Nation, and went forth to do battle for the honor of the flag, and the preservation of our free institutions imperiled by the civil war, who suffered untold hardship, and who *all* risked life, and many fell, and others were wounded, on the field of battle, will not permit the plea of the statute of limitations to bar a sacred promise made to them, no matter how long a time has elapsed between the promise and the failure to discharge the obligation according to the terms in which it was made.

d—It was the duty of the Legislature to provide money for the payment of the war bounty offered by the State under Act No. 23, Laws of 1864, and the history of those times, of which the Court will take judicial notice, shows that that duty was performed.

e—The Legislature, by the acts of February 5, 1864, March 2, 1865, and March 21, 1865, provided ample means for paying the bounties offered under Act No. 23, Laws of 1864. These acts *authorized* and *directed* the Governor and State Treasurer, whenever necessary for the purpose of paying State bounties, to contract loans and issue bonds therefor, and pay the avails over to the credit of the "war fund," which bounties were directed to be paid from *this* fund upon the warrant of the Auditor General, upon proper vouchers or estimates of the Quartermaster General of the State, certified by the Governor. This was a sufficient appropriation by the Legislature, and authorized the Auditor General, until the passage of Act No. 173, Laws of 1881, to draw his warrant

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WAR BOUNTIES—Continued.

on this "*war fund*" whenever the money for the purpose of paying bounties reached that fund, upon proper certificates of the Quartermaster General and Governor.

f—The object and intent of the Legislature, in the passage of Act No. 173, Laws of 1881, was to do away with the authority of the Quartermaster General in allowing claims for bounties, and place claimants for bounties in the same category as others having claims against the State for adjustment. *Id.* (2).

WATERS AND WATER-COURSES.

1. The right to discharge a drain upon the lands of another cannot be acquired by 20 years' user, unless the drain be one and the same, and the use thereof uninterrupted during the whole period (*Cotton v. Manufacturing Co.*, 13 Metc. 429); and the measure of such right is not the dimensions of the drain, but the quantity of water discharged upon said land. 100 (2).
2. No one has the right, without redress, to flood the wild lands of another, or to add to the water upon them, because no present special damage can be shown. 101 (3).
3. A drain commissioner cannot, under the law, in laying a public drain, empty water upon the lands of another that does not belong to him, without providing a proper outlet for its passage from his premises; and if he does so he is responsible for the consequent damages. *Id.* (4).

See ACTION.

WILL.

1. Under the provisions of How. Stat. § 5808, providing for granting letters testamentary on the proof of foreign wills, the estate must be disposed of in accordance with the directions contained in the will. 42 (1).
2. In administration proceedings under a foreign will admitted to probate in this State, the construction placed upon it by the proper court of the state where the testator resided will be adopted by our courts, unless it can be clearly gathered from its terms that the testator had in mind the laws of this State, or used language necessarily referring and only appropriate to this State. *Id.* (2).

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WILL—Continued.

3. Where a will directs the testator to convert certain real estate in one state into rentable "inside" property in a specified city in another state, as soon as practicable after the testator's death, irrespective of all contingencies, an equitable conversion of said real estate is effected by the terms of the will. *Id.* (3).

4. Double conversion does not differ from single conversion, but the property is treated as if already converted into that species of property into which it is directed to be changed, no matter whether the steps are more or less numerous. 43 (4).

5. The object of How. Stat. § 5531, which prohibits the suspension of the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, was to prevent the accumulation of large landed estates to be held in perpetuity, or for a long series of years, and said statute is not violated by the direction in a foreign will, admitted to probate in this State, that Michigan lands shall be sold, and the proceeds invested in lands in another state, there to be held for any number of lives. *Id.* (5).

6. The probate court has jurisdiction to construe a will, such power being necessarily involved in the power to assign the estate of the testator on the settlement of the executor's account. 228 (1).

7. Under a will bequeathing to the testator's wife all the estate of which he died seised or possessed, "to and for her own use and benefit and disposal, for and during the term of her natural life, leaving said estate to be used and disposed of by her, wholly to her discretion and judgment as she may decide her needs require," and the remainder of said estate, after her decease, to go to four of the testator's children, naming them, the widow takes a *life-estate*, in the use of which she must be governed by the rules applicable to tenants of such estates. *Id.* (2).

8. The *form* of an instrument is of little consequence in determining whether it *is* or is *not* a will. If it is executed with the formalities required by the statute, and is to operate only *after the death* of the maker, it is a will. 285 (1).

See EVIDENCE (11).

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[1] Liquor tax law of 1889, declared unconstitutional.

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